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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913,

THE OHIO RIVER AND WESTERN RAILWAY COMPANY, A CORPORATION,

APPELLANT,

vs.

ROBERT M. DITTEY, FRANK E. MUNN AND CHRISTIAN PABST, AS THE TAX COMMISSION OF OHIO, AND THE TAX COMMISSION OF OHIO,

APPELLEES,

[No. 642.]

And

THE MARIETTA, COLUMBUS AND CLEVELAND RAILROAD COMPANY, A CORPORATION,

APPELLANT,

vs.

DAVID S. CREAMER, TREASURER OF STATE OF THE STATE OF OHIO; EDWARD M. FULLINGTON, AUDITOR OF STATE OF THE STATE OF OHIO; TIMOTHY S. HOGAN ATTORNEY GENERAL OF THE STATE OF OHIO; ROBERT M. DITTEY, FRANK E. MUNN AND CHRISTIAN PABST, AS THE TAX COMMISSION OF OHIO, AND THE TAX COMMISSION OF OHIO,

APPELLEES.

[No. 643.]

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

These suits were brought in the United States District Court for the Southern District of Ohio (East-

ern Division) by the appellants, which are Ohio railroad corporations, to enjoin the certification and collection by the appellees of a tax which the State of Ohio was seeking to enforce upon the privilege of carrying on business in that state. This tax appellants claimed to be in violation of the due process and equal protection clauses of the Fourteenth Amendment and of the Commerce Clause of the Federal Constitution, and also of the Preamble and sections two and nineteen of the Ohio Constitution.

A temporary restraining order was allowed by the District Court, and later the appellants' motions for temporary injunctions came on for hearing before three judges, of whom one was a circuit judge, pursuant to Section 266 of the Judicial Code, which went into effect shortly after the bills were filed. The two cases were argued and considered together, upon the facts averred in the bills, which were, for the purposes of such motions, conceded to be true by appellees, and, after consideration, the temporary injunction was refused.

Ohio River and Western Ry. Co. v. Dittey et al., 203 Federal, 537.

Thereupon appellants came by appeal direct to this court, under favor of Section 266 of the Code.

By agreement, the two cases are briefed together, as they present practically the same facts and exactly the same questions of law.

The tax in question, the validity of which we attack generally, and also specially in its application to appellants, was enacted in its present form May 31, 1911. (102 Ohio Laws, 224.)

It created a tax commission, with defined powers, and prescribed various taxes, some upon property and others

upon franchises and privileges, with sundry provisions, penal and otherwise, for the collection thereof. Some of these taxes were new in Ohio law, others were carried over from previously existing statutes.

The tax here in question is limited in its operation to certain lines of quasi-public business, specifically named in the act and therein referred to as "public utilities," including railroads.

As applied to railroads, the act requires the filing with the Tax Commission, by each railroad doing business in the state, of a statement, on or before September 1, setting forth, among other things, its "entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government." (Section 82 of Act; Section 5471, General Code of Ohio.)

It is further provided that on the first Monday of October the Commission "shall ascertain and determine the gross earnings as herein provided of each railroad company whose line is wholly or partially within this state for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the Commission shall be the gross earnings of such railroad company for such year." (Section 5477, General Code.)

The Act further provides that on the first Monday of November the Commission shall certify to the Auditor of State the amount of the "gross earnings thus determined,"

(G. C., 5482)—and that—"In the month of November, the Auditor of State shall charge for collection from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by the Commission as the gross earnings of such company on its interstate business for the year" * * * "by taking four per cent. of all such gross earnings." The tax is imposed equally and alike on corporations, partnerships, and individuals. (G. C., Section 5415.)

The general origin and nature of the tax having been thus briefly referred to, we believe that our brief may be shortened and, in a measure, simplified by introducing the other facts subsequently in connection with our discussion of the several assignments of error, as to which respectively such facts may be pertinent.

Jurisdiction.

The Federal jurisdiction rested upon the Federal questions presented in the record, and not upon diversity of citizenship. The bills were filed prior to January 1, 1912. The amount in controversy in each case exceeds two thousand dollars, exclusive of interest and costs. Neither the Federal nor the equity jurisdiction is challenged by appellees.

The Act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of their suits. (Section 5506, G. C.)

This has been frequently held to be sufficient to warrant a resort to equity.

Shelton v. Platt, 139 U. S., 591.
Cooley on Taxation, page 536.
Dows v. Chicago, 78 U. S. (11 Wall.), 108-12.

In addition to this feature of the case, there are also other elements which make it plain that there is no adequate remedy at law, and that the threatened mischief is irreparable.

One of the appellants, The Marietta, Columbus and Cleveland Railroad Company (which, for convenience, we shall hereinafter call the Marietta Company) is absolutely without means to pay the tax, short of the dismemberment of its physical property and the consequent destruction of its public business, inasmuch as it is not earning enough to pay its operating expenses. The other appellant, The Ohio River and Western Railway Company (which, for convenience, we shall call the Ohio River Company) is not quite so desperately situated, but the averments in its bill show, we think, its financial condition to be such as to warrant the conclusion that an indefinite deprivation of the amount involved in the tax while an action at law were pending for its recovery would be such a hardship as to amount to irreparable injury.

Again, the penalties and coercive features of the Act are such as to warrant injunctive relief from the irreparable injury which their infliction would cause. Among such features is a provision, in effect, that non-payment of the tax for ninety days shall result in the cancellation of the delinquent's articles of incorporation, with heavy penalties for continued corporate activity of any kind. It is apparent that such "capital punishment" would effectually paralyze resistance to any attempts at collection of the tax, long before its validity could be determined. Indeed, as we shall subsequently point out at length, the penal provisions of the Act are so excessive as to be invalid and hence to warrant injunctive protection against their imposition.

Ex parte Young, 209 U. S., 123.

It is at least extremely doubtful whether, in any event, an action at law could be maintained to recover the tax after payment.

Section 12075, G. C., provides:

> "Common Pleas and Superior Courts may enjoin the illegal levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

Such right of recovery, however, is rendered inapplicable in case of the present tax (which is not collected on the county duplicates) by the provisions of Sections 12077, G. C., to the effect that—

> "Actions to recover back taxes and assessments must be brought against the officer who made the collection, or if he be dead, against his personal representative. When they are not collected on the county duplicate, the corporation which made the levy must be joined in the action."

Inasmuch as in the present case the State itself was the corporation which made the levy, its immunity from suit would preclude a recovery back of the tax after its payment.

Furthermore, even if this were not true, we think it is a serious question whether the special provisions of Section 33 of the Act (1465-31, G. C.) do not supercede pro tanto the general terms of Section 12075, supra, and limit the protesting utility to a refusal to pay and a defense on the ground of illegality. Maintenance of such a defense would soon become impossible, as already shown, by virtue of the cancellation of its articles and paralysis of its power of corporate action.

Section 33 just referred to, and which we shall further consider, infra, attempts to forbid injunctive interference with the collection of the tax, and provides that "nothing herein shall affect any right or defense in any action to collect any tax or penalty."

Finally, such various and apparently concurrent methods are provided by the Act for enforcing the tax, through different agencies, that a multiplicity of actions is avoided by the simple suit in equity.

Assignment of Errors on Appeal.

First: The court erred in refusing the plaintiff an interlocutory injunction against defendants, restraining the defendant, Creamer, Treasurer, from certifying plaintiff as delinquent for the current year under the Ohio statutes providing for the so-called excise tax (Act of May 31, 1911, 102 Ohio Laws, 224), and the defendant Fullington, Auditor, from receiving such certification and from adding any penalty to said tax or from preparing any duplicate of report thereof, and the defendants, Dittey, Munn and Pabst, as The Tax Commission of Ohio, and The Tax Commission of Ohio, from certifying to the Secretary of State that plaintiff had failed to pay said tax or penalty, and restraining them and the defendant Hogan, Attorney General, from taking any steps toward the collection or enforcement of said tax against plaintiff or the cancellation of its articles of incorporation.

Second: The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants), to the effect that the so-called excise tax imposed by the statutes of Ohio (Act of May 31, 1911, 102

Ohio Laws, 224), upon the privilege of carrying on plaintiff's intrastate business for the current year, was wholly in excess of the value of that privilege, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and of the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Third: The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the classifications and subclassifications in the Ohio statutes providing for the so-called excise tax (Act of May 31, 1911, 102 Ohio Laws, 224), were arbitrary, unreasonable, unduly and unjustly discriminatory against the plaintiff, and not a legitimate exercise of legislative power or discretion, thereby violating the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Fourth: The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the Ohio statutes providing for the so-called excise tax (Act of May 31, 1911, 102 Ohio Laws, 224), involved a discrimination against and imposed a burden upon interstate commerce, in violation of the commerce clause of the Constitution of the United

States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Fifth: The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants), to the effect that the Ohio statutes imposing the so-called excise tax (Act of May 31, 1911, 102 Ohio Laws, 224), are a regulation of and a burden upon foreign commerce, in violation of the commerce clause of the Constitution of the United States, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Sixth: The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants) to the effect that the so-called excise tax imposed by the Ohio statutes (Act of May 31, 1911, 102 Ohio Laws, 224), is in reality a double tax upon plaintiff's property, lacking uniformity and equality, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Section 2, Article 12, of the Constitution of Ohio, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Seventh: The court erred in holding that the facts averred in the bill (which were, for the purposes of the application for a temporary injunction, admitted by defendants), to the effect that the fines, penalties and forfeitures provided for in the Ohio statutes relating to the so-called excise tax (Act of May 31, 1911, 102 Ohio Laws,

224), and the provisions therein seeking to prevent a judicial review of the validity thereof, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Section 16 of the Bill of Rights of the Ohio Constitution, did not call for or warrant the granting of a temporary injunction against the defendants, as prayed for in the bill.

Eighth: The court erred in holding that the guaranty against the imposition of a privilege tax greater in amount than the reasonable value of the privilege taxed, involved in the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, as interpreted and construed by the Ohio Supreme Court, particularly in the case of Southern Gum Company v. Laylin, Secretary of State, 66 Ohio State, 578, is applicable and operative only where the privilege tax is generally confiscatory and oppressive, and may not be invoked in individual cases wherein the tax exceeds the reasonable value of the privilege originally conferred or its continued annual value thereafter, and in consequently refusing relief by a temporary injunction from the current so-called excise tax imposed by the Ohio statutes (Act of May 31, 1911, 102 Ohio Laws, 224), on the privilege of carrying on its intrastate business, because it had not been shown that the tax in other instances, and generally, exceeded the reasonable value of the privilege taxed.

Ninth: The court erred in holding the so-called excise tax imposed by the Ohio statutes (Act of May 31, 1911, 102 Ohio Laws, 224), to be an excise tax on the doing of corporate intrastate business.

Tenth: The court erred in holding that the so-called excise tax imposed by the Ohio statutes (Act of May 31,

1911, 102 Ohio Laws, 224), might be regarded as an exercise of the police power of the State, similar in its nature to that involved in the taxation of the business of trafficking in intoxicating liquors; and thereby saved from Constitutional infirmity.

Eleventh: The court erred in holding that the so-called excise tax imposed by the Ohio statutes (Act of May 31, 1911, 102 Ohio Laws, 224), might be regarded as a legislative act to compensate the State and indemnify the taxpayer for the increased burden resulting from the special inconvenience and expenses sustained and supervisory power exercised by the Government over corporate public utilities and for the benefit of those who own and operate such; and thereby saved from Constitutional infirmity.

Twelfth: The court erred in holding that relief could not be afforded the plaintiff under the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, or the preamble and Sections 2 and 19 of the Bill of Rights of the Ohio Constitution, from the current so-called excise tax imposed by the Ohio statutes (Act of May 31, 1911, 102 Ohio Laws, 224), on the ground that in plaintiff's case such tax wholly exceeded the value of the privilege taxed, without at the same time declaring the said tax invalid in its entirety and throughout the field of its application, or, at least, as to all utilities classed with the plaintiff.

ARGUMENT.

A. UNDER THE CONSTITUTION OF OHIO, AS CONSTRUED BY THE OHIO SUPREME COURT, THE LEGISLATURE IS WITHOUT POWER TO IMPOSE A PRIVILEGE TAX WHICH IS IN EXCESS OF THE VALUE OF THE PRIVILEGE TAXED, AND INASMUCH AS THE ADMITTED FACTS SHOW THE PRESENT TAX UPON APPELLANTS TO WHOLLY EXCEED SUCH VALUE, ITS EXACTION AS TO THEM VIOLATES THE STATE CONSTITUTION, AND AMOUNTS TO CONFISCATION AND THE TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

This involves the Second, Eighth, Ninth, Tenth, Eleventh and Twelfth Assignments of Error.

From the bill of the Marietta Company it appears that the tax charged against it for the year 1911 amounts to $2301.24.

That:

> "The capital of the plaintiff has been and is, practically without exception, all invested in the said railroad owned and operated by it as aforesaid, which said investment was and is a reasonable and proper one."

That:

> "Due care and prudence have been exercised in the construction, maintenance, operation and equipment of said railroad property and in the conduct of its business, nor have the same been characterized by waste or extravagance. On the contrary, the greatest economy has been and is being practiced in a bona fide effort to make said railroad yield a fair return upon the investment therein, and all practical means

have been exhausted to increase or render more remunerative plaintiff's freight and passenger traffic, or either of them."

That:

"Notwithstanding the efforts of the plaintiff, it has never been able to earn and is not now able to earn, from its interstate or its intrastate business or both combined, after paying necessary and proper expenses, including taxes other than said excise tax, a return on the investment in its said railroad, or on the value thereof, equal to or as much as the current rate of return on legitimate and high grade investments at all times readily available on the market, nor have its intrastate earnings, after deducting expenses properly attributable to intrastate operations (including taxes other than said excise tax) been sufficient to yield a return on that portion of said investment, or on that portion of said value, properly attributable to intrastate operations, equal to or as much as the current rate of return on legitimate, high grade investments at all times readily available on the market as aforesaid. On the contrary, the plaintiff's gross earnings have not been and are not sufficient to pay its actual operating expenses, nor are its gross intrastate earnings sufficient to pay that portion of its operating expenses properly attributable to intrastate operations, including taxes other than said excise tax, and the plaintiff is actually operating its railroad at great loss; and said condition will continue to exist and will exist during the year which said excise tax is intended to cover."

That:

"Said excise tax and every part thereof exceeds the reasonable annual value of the privilege of carrying on plaintiff's intrastate business," etc., etc.

The bill of the Ohio River Company contains the same averments, except as to the inability to pay actual operating expenses. Its tax amounts to $6653.60.

The Value Limitation.

The leading and controlling case in Ohio is *Southern Gum Co. et al. v. Laylin*, 66 Ohio State, 578. The general validity of the so-called Willis tax, which was a corporate tax upon the franchise to be a corporation, was before the court. While upholding the law under which that tax was imposed, the court took occasion to point out certain definite limitations imposed by the guaranties of the Ohio constitution upon the legislature in the taxation of franchises and privileges generally.

These limitations are thus clearly stated in the syllabus (second and third branches), which, under the rules of the Ohio Supreme Court, contains the actual decision of the court:

> "While there is no express limitation upon the power of the general assembly to tax privileges and franchises, such power is impliedly limited by those provisions of the constitution which provide that private property shall ever be held inviolate, but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote our common welfare.
>
> "By reason of these limitations, a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value hereafter. The determination of such values rests largely in the general assembly, but finally in the courts."

Following are the guaranties in the Ohio constitution, to which the court referred:

> "We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings *and promote our common welfare*, do establish this Constitution." (Preamble.)

"All political power is inherent in the people. Government is instituted for their equal protection and benefit," etc. (From Section 2, Article I.)

"Private property shall ever be held inviolate, but subservient to the public welfare." (From Section 19, Article I.)

As above stated, the so-called Willis tax involved in the Laylin case was a tax upon corporate franchises. In its opinion, the court clearly distinguishes between property taxes and taxes upon franchises and privileges, and points out and distinguishes between the limitations imposed by the Ohio constitution upon the one and the other respectively.

Thus, at pages 593-5, the following language occurs:

"The state is a sovereignty and its powers are sovereign, except as limited and restricted by the Constitution of the United States.

"The grant of legislative power to the general assembly in section one of article two of the constitution is absolute, and is not limited in that section. The absolute and unlimited power of taxation is granted by that section to the general assembly, and the taxation may be upon franchises, privileges or property, as the general assembly may deem best; but when it comes to taxing property, there is a limitation placed upon that power by sections one, two and three of article twelve of the constitution, and by section four of article thirteen of the same instrument. By section one of article twelve, a limitation prohibits the levying of a poll tax for county or state purposes. By section two of the same article, all taxable property, real and personal, is required to be taxed by a uniform rule as its true value in money. By section three all property employed in banking is required to bear a burden of taxation, equal to that imposed on the property of individuals; and by section four of article thirteen, property of corporations is subject to taxation the same as the property of individuals.

These are very important limitations upon the power of taxation of property granted by said section one of article two of the constitution, and are intended to secure uniformity and equality in taxation on property.

"But upon the power to tax privileges and franchises there is no express limitation in the constitution, but certain limitations upon that power must be implied from other provisions of the constitution, so as to make the whole instrument harmonious and consistent throughout. The constitution was established to 'promote our common welfare.' Preamble to the constitution. Government is instituted for the equal protection and benefit of the people. Section two of the bill of rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section nineteen of the bill of rights. These provisions of the constitution are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. *Ashley v. Ryan*, 49 Ohio St., 504; *State ex rel. v. Ferris*, 53 Ohio St., 314, and *Hagerty v. State*, 55 Ohio St., 613, are examples of taxing the privilege or franchise conferred; while *Telegraph Co. v. Mayer*, 28 Ohio St., 521, and *Express Co. v. State*, 55 Ohio St., 69, are examples of taxing the continued value of the existing privilege or franchise from year to year.

"These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts."

The court then proceeds to discuss some of the elements of value involved generally in corporate existence—being

that particular kind of privilege which the Willis tax was designed to reach, as follows:

> "A domestic corporation is given life and continued existence by the state, and this life and existence with their accompanying powers constitute the franchise, and this franchise being valuable and given by the state, the state may impose a franchise tax thereon to the amount of the value thus conferred and continued, the same as in taxation by assessment, the public first bestows a special benefit upon the property, and then takes back by way of assessment a part or all it has thus conferred. *Walsh v. Barron*, 61 Ohio St., 15. A foreign corporation can do business in this state only upon such terms and conditions as the state may impose, and therefore a franchise tax may be imposed upon a foreign corporation for the privilege of doing business in this state. It therefore follows that a franchise tax may be imposed on both domestic and foreign corporations alike."

It is not claimed that the rule thus laid down has ever been changed or modified. As an interpretation by the Ohio court of last resort of its own constitution, it is, of course, not subject to question in this court.

We may rest then safely upon the proposition that if the tax upon the privilege exercised by these plaintiffs exceeds the value thereof, it is void.

If the constitutional limitations as expounded in the Lavlin case are to be real and vital and are to afford genuine protection to the individual, they must, of course, be capable of practical application.

We are thus conducted to the question: What is the measure of the continued value to the plaintiffs of the carrying on of their intrastate business, respectively?

The averments in the bills which, for present purposes, stand admitted, disclose that notwithstanding prudent in-

vestment, wise and economic management, and the exhaustion of all practicable means to increase the revenue, the plaintiff, The Marietta, Columbus and Cleveland Railroad Company, is not able to and will not be able to earn enough on its intrastate business to pay the expenses of carrying it on; while The Ohio River and Western Railway Company, under similar circumstances, cannot earn even that minimum rate of return which the value of its property would bring if invested in high grade securities always available on the market. If the value of the naked privilege of carrying on a business is to be measured by the available fruits thereof, then is it not apparent that the State is here attempting to tax a value which does not exist, and to take that which it has never conferred? The admitted averments of the bill of The Marietta, Columbus and Cleveland Railroad Company show that the business itself is valueless, and while the bill of the Ohio River and Western Railway Company does not show an entire absence of net earning power, it does show that the privilege of carrying on the business possesses no value, and this privilege is the thing that is taxed.

There is an obvious distinction between the value of a business and the value of the privilege of engaging in that business. For the reasons just mentioned, this distinction is important only as regards the case of The Ohio River and Western Railway Company, and before giving it further consideration we wish to briefly refer to the case of The Marietta, Columbus and Cleveland Railroad Company. As to it, both the privilege of engaging in intrastate business and the business itself are without value. It is idle to claim that a business which is conducted at a loss is a valuable business, and much the less that the privilege of engaging in it possesses any value.

Common sense and authority alike support the proposition laid down by this court through Mr. Chief Justice FULLER in *Postal Telegraph Cable Company v. Adams*, 155 U. S., 688-697:

> "* * the value of property results from the use to which it is put and varies with the profitableness of that use."

See also Galveston, H. & S. A. R. Co. v. Texas, 210 U. S., 223, 226.

A business which, under prudent and economic management, will not earn enough to pay its necessary expenses, and cannot be made to do so, possesses no value. On the contrary, its operation necessarily means a loss to the proprietor. Under the averments of its bill, The Marietta, Columbus and Cleveland Railroad Company is serving the public at a loss, and to say that the opportunity of doing so constitutes a valuable privilege would seem to furnish its own refutation.

The case of The Ohio River and Western Railway Company furnishes an illustration of the distinction above referred to between the value of a business and the value of the privilege of carrying it on. The value of a business may be measured by the net return which it yields upon the investment. This is an absolute thing. The value of the privilege of carrying on that business, however, is necessarily a relative thing, and is measured by the excess, if any, which it yields upon the investment, over and above what a readily available investment of the same capital would yield. To illustrate, let us suppose that industrial bonds of ordinary security are issued, bearing two per cent. interest. Such bonds will have a certain absolute value,

notwithstanding their unattractiveness. The privilege of acquiring such bonds, however, obviously possesses no value, and if the opportunity to acquire the same should be wrongfully denied anyone, he could not successfully claim to have suffered any real damage. While in such a case the individual may have been denied an opportunity to which he was legally entitled, he has not been damaged, because equally good and, indeed, much better investments are readily available to him.

The theory upon which alone, under our Ohio Constitution as interpreted in the Laylin case, an excise tax of this character can be maintained, is that the State is conferring or continuing a privilege or opportunity which carries with it an added value, a reasonable portion of which it may retake through the tax. No one will contend that the excise tax law would be valid if in terms it forbade any utility from charging the public enough to pay its operating expenses, nor would it be valid if it forbade the utility from charging more than enough to enable it to earn two per cent. on the investment, for by its terms it would preclude the existence of the value which alone could be the basis for the tax. Unless it confers this, it confers nothing. It must not be forgotten that the tax is not upon the privilege of doing business *in corporate form*, nor upon any corporate franchise or privilege. It is upon the privilege of engaging in the business, whether by individuals, partnerships, or corporations.

If the constitutional limitations applied in the Laylin case are to have any real force, it is apparent that some practical measure of value must be found for the privilege of carrying on the business in question. Such measure cannot be the excess of earning power in the business over

nothing, for, if so, then such excess might be no greater than the tax itself, and the privilege taxed would then consist in an opportunity to carry on an enterprise which brought no return. Nor it is any better if the measure of value should be made the excess of earnings over expenses, including the tax, for, as we have already pointed out, the measure of the value of the privilege is necessarily a relative thing. There must be some outside standard of measurement. We think it is apparent that the only practical and, indeed, the only possible standard is the current rate readily available to the investor. Such is the fair, natural and reasonable measure of value.

The naked question is presented to the court, free from any complication. Thus, it is averred, and is admitted for present purposes, that The Ohio River and Western Railway Company is unable to earn on its invested value a return equal to the returns to be derived from high class investments always readily available on the market. This makes a showing probably in excess to that actually required. It would apparently have been sufficient had we been able to show that the value of such investment was less than that of other investments *of the same class with itself*, readily available on the market. In view of the showing thus made, no claim, of course, can be asserted that the investment afforded by the privilege taxed is of a higher class than the average investment and hence possesses an additional value. Indeed, the only basis for the classification of investments is their income yielding properties, either actual or potential.

Again, it is averred, and hence admitted for present purposes, that the conditions now existing with reference to the business and the investment therein will continue.

Hence it cannot be claimed that there is a prospective value here, and that such prospective value could save the tax.

Nor can it be charged that the lack of value in the privilege is due to mismanagement or unwisdom in the investment, (even supposing that this latter element could be a proper one for consideration) for the averments in the petitions preclude such a supposition.

While there is little or no authority dealing directly with the precise question now under discussion, it finds much support in well settled doctrines of law taken from other but related fields.

Thus, in the law of damages, we find that where the breach of a contract denies to the wronged promisee nothing but what is readily available to him at the same or lower price, he is entitled at most to nominal damages, for the measure of his damages is the difference between the contract price and the market price.

Sutherland on Damages. Sections 88-89.
Warren v. Stoddart, 105 U. S., 224.
Dillon v. Anderson, 43 N. Y., 231.

Practically the same rule is applied in the case of the sale of stock and bonds. Where there is a breach by the vendor, the vendee is entitled to no more than the difference between the contract price and the highest price such stocks or bonds reached on the market in the interval between the time when the delivery should have been made under the contract and the expiration of a reasonable time for going into the market and replacing the same with equivalent securities.

Such is the rule as applied in New York, and, to a limited extent, in the federal courts.

Gallagher v. Jones, 129 U. S., 193.

In perhaps a majority of the states, the rule of damages is the difference between the contract price and the market price of the stock at the time and place of delivery.

Sutherland on Damages, Section 657.

In the case of Barnes v. Brown et al., 130 N. Y., 371, there was a breach of a contract to assign full paid stock of a certain corporation. Stock not full paid was accepted and returned. The stock stipulated for had no actual or market value at the time the pretended delivery of it was made. It was held that the plaintiff was only entitled to nominal damages, although the defendant, in order to perform the contract, would have been obliged to pay for the stock. The plaintiff's recovery could not exceed the sum that would indemnify him for his loss. As was said by the court:

> "The value of the stock or its pecuniary equivalent was the measure of his injury by the default; and, as it had no value, the plaintiff was awarded complete indemnity by the conclusion of the referee that he was entitled to recover nominal damages only."

The same principle, namely, that the measure of damages resulting from the denial of an opportunity must be determined with reference to the value of other available opportunities, and that where such other opportunities are present and their value is equal to or greater than that of the opportunity denied, no actual damage has been suffered, is also illustrated and applied where damages are claimed for personal injury. The injured party may recover for loss of earning power, but it must be a real loss, and if his disability still leaves open to him avenues of lucrative activity, the damages otherwise recoverable

must to that extent be diminished. It would, of course, logically follow that if other lines of employment or activity, involving equal or greater remuneration than that shut off by his injury, were open and at all times readily available to him, he could recover nothing, so far as earning power was concerned.

See also *Sutherland on Damages*, Section 692.

We submit that these well settled principles taken from the law of damages present, as it were, the other side of the rule for which we are contending in the present case.

Let us suppose that the state, as a contracting party, had offered to plaintiff, in consideration of the payment of tax, the privilege or opportunity of carrying on or continuing a particular business. We will assume that the state breaks its contract and refuses to grant the business privilege, and that it is subject to respond therefor in damages, like an individual. The measure of damages will, of course, be the value of the thing which the state should have granted and which it failed to grant. In the absence of data, the ascertainment of that value might be a matter of difficulty but if the amount of the investment were known, and the return upon that investment which the wrongfully denied privilege would have brought were known, and it were also known that other investments of the same capital were available to the plaintiff which would bring it a better rate of return, then we submit that in any event plaintiff could recover from the state no more than nominal damages.

In other words, when one makes an admittedly bad bargain, he suffers no damage from its repudiation by the other party.

It must not be forgotten that the plaintiffs are not attacking the value of an untried privilege. Had these suits been brought at the time plaintiffs began business, or shortly thereafter, the court might have had some excuse for saying that the plaintiffs should try it out and determine from experience what, if any, value the privilege did possess. Such has been the attitude of the courts in many instances where untried rates were attacked.

Wilcox v. Consolidated Gas Co., 212 U. S., 19.
Northern Pacific R. Co. v. North Dakota, 216 U. S., 579.

No such claim can now be made against the plaintiffs. The privilege has been tried and has been found wanting in value. The plaintiffs indisputably would be better off with their capital uninvested than they are in the exercise of the privilege taxed. They are, in fact, giving to the state more than they are receiving. They are respectively devoting to the business, (which is one in which the public has an interest and by which it benefits), an investment—a value—which they could more profitably place in high class securities, where the risk is at a minimum. The capital invested by the plaintiffs is *at the least*, worth annually a rate equal to that which is paid concurrently on the market by high grade securities. Hence when it is invested in an enterprise which denies it an equivalent return in the one case and any return at all in the other, the interests of the owners are being sacrificed at least to that extent. Under such circumstances, the owners do not reap any benefit from the opportunity to enjoy such an investment. It is a positive injury to them, and hence it cannot be said to possess any value.

The principle under discussion finds another illustration in the law relating to local assessments.

This was pointed out in the case of *Southern Gum Company v. Laylin, supra*. There, as here, the power to take is limited by the benefit or value of that which has been given.

An assessment cannot constitutionally exceed the benefits actually conferred by the improvement for which it is levied.

> *Martin v. District of Columbia*, 205 U. S., 135.
> *O'Brien v. Wheelock*, 184 U. S., 450.
> *Shoemaker v. United States*, 147 U. S., 282.
> *Norwood v. Baker*, 172 U. S., 269.

Thus it was said in the case of *City of Allegheny v. Western Pennsylvania R. Co.*, 138 Pennsylvania State, 375-383:

> "In the absence of any such benefit, in a case where we can declare as a matter of law no such benefit can arise, the legislature is powerless to impose such a burden. It would not be a 'tax,' in any proper sense of the term; it would be in the nature of a forced loan, and would practically amount to confiscation."

The measure of the benefit is ordinarily determined by the market value of the property before and after its improvement. As a practical proposition, it is usually necessary to determine such question of value when the improvement is made and before any actual experience with conditions as affected thereby.

Let us suppose a case, however, in which the assessment is deferred until after the effect of the improvement upon the property involved has had an opportunity to show itself; and that as a result thereof it clearly and indisputably appears that the property was worth more without

than with the improvement. Could it be claimed that such property might then be assessed for that improvement?

In the case of *Walsh v. Barron, Treasurer*, 61 Ohio State, 15, cited in the Laylin case supra, the rule is thus stated:

> "The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is, that the property is specially benefited by the improvement beyond the benefits common to the public, and that a ratable assessment of the property to the extent of these benefits violates no constitutional right of the owner, and is just and proper. But it can in no case exceed the benefits without impairing the inviolability of private property."

In order to furnish the basis for a local assessment, the special benefit must be direct and immediate and of a pecuniary nature.

Thus in *Hartford v. West Middle District*, 45 Connecticut, 462, it is said by the court:

> "To render the assessment of benefits legal and valid, it must appear that the benefit is direct and immediate, and not contingent and remote."

And again in *Erickson v. Cass County*, 11 North Dakota, 494, 92 Northwestern, 841, it was held:

> "That the assessments authorized to be imposed upon lands by Section 1452 Rev. Codes, are for benefits which are special to the land assessed, and are not what are commonly termed 'conjectural' or 'speculative' benefits."

Other phases of the law of special assessments will be considered subsequently in another connection.

One thing is certain. The Constitution of Ohio definitely limits the power of the legislature in levying an

excise tax on a privilege, to the value of the privilege. Where the privilege taxed consists in the opportunity to carry on a particular business, i. e., the opportunity to devote one's property to a particular use, then it must follow that the value of the business will depend upon and vary with the net returns from that use. No other measure of value is or can be practicable.

To quote again the language of Mr. Chief Justice FULLER, in *Postal Telegraph Company v. Adams*, 155 U. S., 688-697:

> "* * * the value of property results from the use to which it is put and varies with the profitableness of that use."

See also *W. U. Telegraph Co. v. Wright*, 185 Federal 250-257.

If, then, the value of the business varies with and is measured by the profit on the investment which the particular use thereof yields, it necessarily follows that the value of the privilege or opportunity or carrying on that business must be determined by its net earning power—its rate of profit—as compared with the rate of profit open to the investor, irrespective of the privilege. No fairer standard to the state could possibly be applied than that in the present case, viz., the rate of return on high class securities always available on the market, for an investment in securities of a railroad such as that of the plaintiff is obviously far from being a high class one. If the value of the privilege cannot stand by this test, it must inevitably fail.

To have a value, the privilege must confer or continue an earning power otherwise unpossessed or unavailable, for if it does not do so, then it confers nothing.

These principles had been declared by the Ohio Supreme Court in the Laylin case before the present excise tax law was enacted. The legislature must fairly be presumed to have acted with reference to them.

To put it the other way, the tax was intended to reach those public utilities which are, through the opportunity extended them, reaping such an added reward on intrastate business as warrants the state in exacting a contribution therefrom. It was an attempt to reach privilege, not poverty.

Acting upon the widely prevalent notion that many of the public utilities were reaping vast rewards through the privileges involved in their several business enterprises, it was the idea of the legislature to divert a portion of such profits to the public coffer.

It may be asked why the legislature did not expressly exempt utilities in the condition of the plaintiffs. The answer is that very probably it was thought unwise to attempt such a classification, and that it was deemed better to include all and then permit those which, under the constitution were exempt, to assert such exemption in the courts, where all the facts involved could receive adequate consideration.

The District Court, in refusing a temporary injunction, did not dispute the correctness of our standard of value for the business privilege in question. On the contrary, its propriety was, tacitly at least, conceded. Nor was the authority of the value limitation, as laid down in the Laylin case, questioned. The court, however, took the view that a single utility could not avail itself of such limitation as a means of individual protection, but that the limitation was operative only where, throughout the entire field of the

tax, it was true generally that the tax was in excess of the value of the privilege taxed. Thus:

> "The court dealt in that case" (the Laylin case) "with a general law and its operation on all corporations of given classes throughout the state, and not with its operation on specific financially weak corporations of any one of those classes."
>
> *Ohio River & Western Ry. Co. v. Dittey et al., etc.*, 203 Federal, 537-541.

And again—

> "We think it can be confidently asserted that the Supreme Court of Ohio meant by the language employed in the Southern Gum Company case that only those excise tax laws, the result of whose operation is generally confiscatory and oppressive, are unconstitutional, and that it did not intend to say that a law, general and uniform in its operation, is invalid, because in exceptional cases it may impose a hardship." (Page 546.)

When the opinion is analyzed, the only grounds upon which this conclusion is made to rest are found to be the following:

First: The case of *State v. Guilbert*, 70 Ohio State, 229.

Second: The doctrine laid down in *Western Union Telegraph Co. v. Mayer*, 28 Ohio State, 521.

Third: The equality provision in the Ohio Constitution, touching taxation, and certain cases dealing therewith.

Fourth: The case of *Adler v. Whitbeck*, 44 Ohio State, 539, dealing with the tax upon trafficking in intoxicating liquors.

First: State vs. Guilbert, supra.

This case dealt with an inheritance tax. In the prior case of *State ex rel. v. Ferris*, 53 Ohio State, 314, it had been held that an inheritance tax is an excise tax, and

within the power of the legislature. The tax then under consideration, however, was held unconstitutional, because it undertook to exempt from taxation the right to succeed to estates not exceeding twenty thousand dollars in value, while taxing the whole right of succeeding to estates exceeding that sum in value, and also because it sought to tax at a higher rate the right to succeed to estates of larger value than to estates of smaller value.

In a subsequent case, *Hagerty v. State,* 55 Ohio State, 613, a collateral inheritance tax was upheld as an excise, tax, notwithstanding the fact that it discriminated among collateral kindred, in the sense that the right to inherit by certain classes of collateral heirs was taxed, while the right to inherit by other classes was not taxed; such discrimination having been, in the opinion of the court, justified because of the existence of degrees in collateral kinship.

The only new question before the court in the Guilbert case was whether the inheritance tax law then before it was rendered unconstitutional because of its exemption of estates not exceeding three thousand dollars in value. It was claimed that, inasmuch as Section Two of Article Twelve of the Ohio Constitution, which requires the taxation of property to be by uniform rule and at its true value in money, permits, or then permitted, (for it has since been changed as to amount) an exemption of but two hundred dollars' worth of personal property, such exemption provision should equally limit the right to make exemptions in excise tax laws, and that even if Section Two of Article Twelve did not relate expressly to excise taxes, nevertheless, by analogy at least, it should be held to control, so far as exemptions were concerned, in excise tax

legislation. This claim was refuted by the court, which held that Section Two of Article Twelve was a limitation on the general taxing power inherent in the legislature as such, and related only to the taxation of property, and that inasmuch as the three thousand dollar exemption operated uniformly throughout the state and bore equally upon all persons standing in the same category, it could not be said to deprive anyone of the equal protection of the laws. It is apparent that the court did not have before it, and did not consider, the question of value limitation, dealt with in the Laylin case.

The reasoning of the District Court, based upon the Guilbert case, seems to be that inasmuch as it was there stated that an excise tax operating uniformly throughout the state, and applying equally to all the subjects embraced within its terms, cannot be said to deprive anyone of the equal protection of the law or in any manner to violate the Bill of Rights or any section of the Constitution, the conclusion must follow that the court meant that there was no other constitutional limitation upon the right to levy an excise tax, and that the value limitation, as laid down in the Laylin case, was, for all practical purposes, repudiated.

We think this is an unwarranted conclusion. As we have pointed out, the court was considering only whether it could be claimed successfully that the exemption feature introduced any unwarranted discrimination, and the language quoted must be construed with reference to that fact. It can hardly be thought that the Ohio court, in using the language quoted from the Guilbert case in the opinion of the court below, intended to hold that an inheritance tax which in general or in specific instances ex-

ceeded the value of the inheritance taxed would be enforcible generally or in such particular instances, as the case might be. Yet such would be the logical outcome of the reasoning of the court below. Nothing is said in the language quoted about value limitation or about confiscation; and even appellees, we think, will admit that if an inheritance tax were generally in excess of the value of the inheritances taxed, it would be unconstitutional, as amounting to confiscation.

We submit that the proper view to take of the Guilbert case is that it did not involve the question of value limitation, nor was that question considered, and consequently it did not impair, or, indeed, have any bearing upon the doctrine in that regard enunciated in the Laylin case.

Second: *Telegraph Co. v. Mayer*, 28 Ohio State, 521.

This case dealt with a tax on the privilege of exercising their corporate franchises in Ohio on the part of certain classes of foreign corporations.

The court below in the present case did not claim that the Western Union case was in point, but referred to it as follows:

> "The court, it is true, was speaking of a law affecting foreign corporations only which could exercise none of their powers or franchises within the state, save through comity, or under legislative consent, and which the court found might have been excluded from the state altogether, with which theory we have nothing to do. But it is also true that it recognized the power to raise the necessary funds to defray the legitimate expenses of government by modes other than an ad valorem system of taxation on all property in the state and also the legislative power to create domestic corporations and prescribe the terms upon which they, as well as foreign corporations, might exercise their franchises. The right to extend the tax to domestic corporations undoubtedly existed, as was later held in

> the Southern Gum Co. case, but the Legislature did not see fit to embrace such corporations within the law. It would therefore seem to follow that the language quoted is applicable to all corporations of a given class, and that a law which is of uniform operation as to that class is not repugnant to any constitutional provision, state or federal, although it may bear heavily upon some given individual or individuals falling within its terms."

We respectfully take issue with both the premise and the conclusion embodied in this reasoning. The premise we think involves the fallacy that the tax here involved is a tax upon the privilege of exercising *corporate* franchises or privileges. As we have heretofore pointed out, the present tax is imposed upon the specific privilege of carrying on a business wholly irrespective of whether such business be carried on by a natural person, a partnership or a corporation.

> "The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association * * * and herein referred to as express company," etc., etc.
>
> (General Code, Section 5415.)

This error is specially covered in our ninth assignment of error.

The conclusion drawn seems to lose sight altogether of the value limitation. If the court below is correct, then uniformity of operation and applicability to all the members of a given class are the only tests to which an excise tax is subject. If this be true, it eliminates the value limitation absolutely, however construed, and thus comes in conflict with the opinion of the District Court itself touching the proper construction of the Laylin case in that re-

gard. An excise tax law might be applicable by its terms to all the unities composing a given class, and it might have uniform operation as to that class, in that it would include them all. Nevertheless, it might be generally, throughout its field, in excess of the value of the privilege taxed. Yet under such circumstances, if we read the opinion below aright, the District Court would hold the law invalid, under the Laylin case, notwithstanding its uniformity of operation.

In giving to the cases of *State v. Guilbert* and *Telegraph Company v. Mayer* the construction which it did, the District Court, we submit, attempted to prove too much, and logically reached a conclusion which would wholly eliminate the value limitation of the Laylin case, for all purposes. We think that the explanation lies in the fact already adverted to, that the Guilbert and Telegraph Company cases dealt with an entirely different proposition, and involved only the question, what would satisfy the equality requirements of the Constitution as applied to the particular excise taxes then before the court.

Third: The view just expressed finds confirmation in what is said generally by the court below in reference to the matter of equality in taxation under the Ohio Constitution.

It is asserted in the opinion that equality in regard to taxation of property is the great idea of the Ohio Constitution, and from this the inference is sought to be drawn that if relief were afforded to individuals nominally subject to an excise tax, because such tax as to them might exceed the value of the privilege taxed, the required equality would thereby be broken.

It is insisted in this connection that there can be no exemption from the burden of taxation unless such exemption is clearly authorized by the Constitution, and that an insolvent must pay his property tax, as well as a man of wealth. This, however, loses sight of the distinction between a property tax and an excise tax which was made in the Laylin case, and which turns upon an inherent difference between the two kinds of taxes. One is a tax upon property and depends upon the ownership of that property and must, under Section Two of Article Twelve of the State Constitution, be imposed by a law of uniform operation and in accordance with a true valuation of property. The right to impose such a property tax does not spring from any special benefit conferred by the taxing authority upon the individual owner, but rather from general considerations growing out of governmental protection and the necessities of government. The tax, however, upon the specific privilege exercised by an individual presupposes the enjoyment by that individual of that privilege; and it must further, under the Laylin case, presuppose the enjoyment of a privilege which is worth at least as much as the tax. The cases cited by the court in the Laylin decision show clearly that the court had in mind the analogy of special assessments, which are limited to the benefit enjoyed by the property assessed, as a result of the improvement for which the assessment is levied. If there is no such benefit, then there is nothing to assess. Nor does the general assessment become invalid, nor is its uniformity broken by the immunity from assessment of the specific property or properties which are unbenefited. If the assessment is uniform among the properties benefited, it is uniform in law and under the Constitution. The ina-

bility of the State of Ohio, under its Constitution, to collect an excise tax on a specific privilege from an individual belonging to the class of those who exercise the privilege, because the privilege of such individual in fact possesses no value, does not affect in any wise the uniform operation of the tax law. There is no exemption of the individual referred to. The tax is simply inoperative as to him, because of the fact that his privilege is valueless. Therefore, he and all others, if any, situated as he is, simply do not come within the operation of the law, because, when the tax law is construed with reference to the Constitution, it must be held to relate only to privileges possessing value, however general its terms. Stress was laid by the court below, in its opinion, upon the impracticability of absolute equality in taxation, whether it be taxation of property or excise taxation, and various authorities are cited in support thereof. This is true, but inapplicable. Take the tax now in question. The more valuable the privilege taxed, other things being equal, the less burdensome will be the payment of the tax, and hence it will operate with greater hardship upon some utilities than upon others. And this cannot be entirely avoided. So long as there is a privilege which possesses value, the state may diminish such value by taking a part thereof in the form of an excise tax; but where the value does not exist, then there is nothing to take; there is nothing upon which the tax can operate.

The appellants in this connection are not seeking relief because as to them the tax is more burdensome than it may be upon some other utilities, but because they are not exercising a privilege possessing value; and hence the State is attempting to take from them something which they do

not possess, namely, an increment of value growing out of the exercise of the specific privilege. This is not discrimination, but confiscation.

The District Court, in its opinion quotes at some length in this connection from the decision by Mr. Justice MILLER in the *State Railroad Tax Cases*, 92 U. S., 575-606.

A careful examination, however, of this opinion discloses that there is nothing in it which militates against our contention, but, on the contrary, it contains some suggestions, at least, which are favorable thereto. The *State Railroad Tax Cases*, so-called dealt with an Illinois tax upon the property of corporations. As applied to railroad companies, it provided for a valuation of their local real and personal property by local taxing authorities, a separate valuation of railroad track, including the right of way, etc., and the rolling stock and other personal property, not local in its character, to be made by a state board. A third and separate valuation was provided for of the franchises and capital stock of the corporation. This was made by the state board. The valuation of the property thus made by the state board, both tangible and intangible, was apportioned among the several taxing districts, in accordance with the railroad mileage therein. The method adopted by the state board in making the third valuation, that is to say, the valuation of the franchises and capital stock, was to first determine the market or fair cash value of the shares of capital stock and fixed indebtedness, and to deduct therefrom the aggregate valuations of the tangible property. It was claimed that this method resulted in an inequality forbidden by the Illinois Constitution; and in support of this claim and this claim only, attention was called to the fact that one of the ap-

pellee companies was insolvent and in the hands of a receiver and unable to pay any interest on its bonds. In discussing this claim, Mr. Justice MILLER uses the language quoted in the opinion of the District Court in the present case.

The *State Railroad Tax Cases* dealt with a property tax. It is true that the capital stock and franchises were taxed thereby, but they were taxed as property, the effort being to reach all of the property of the several corporations, both tangible and intangible. No privileges were taxed as such. That this was the construction placed by this court upon the tax, appears repeatedly in the opinion. Thus, for example, after referring to the tax on the franchises and capital stock, it is said:

> "But it has been a desideratum, perhaps not yet fully attained, to find a method of taxing this species of property which will be at the same time just to the owners of it, equal and fair in its relations to taxes on other property, and which will enforce the just computation that such property should pay for the benefits which, more than property generally, it receives at the hands of government."

And again:

> "The Statute of Illinois, and the rule adopted by the Board of Equalization under the power conferred by the clause we have just recited, may not be the wisest mode of doing complete justice in this difficult matter; but we confess we have, on the whole, seen no scheme which is better adapted to effect the purpose, so far as railroad corporations are concerned, of taxing at once all their property and of making the tax just and equal in its relation to other taxable property of the State."

In Section 1317, page 652, of *Gray's Limitation of Taxing Power and Public Indebtedness*, the Illinois law tax-

ing corporate franchises is designated as a law taxing such franchises as property, and the State Railroad Tax Cases are cited.

It seems to be well settled that franchises may be taxed either as property or as privileges.

Section 47a, page 35. *Gray on Limitation of Taxing Power and Public Indebtedness.*

There is a real distinction here. A franchise treated as property must be regarded as other property, and the individual who owns it can no more escape payment of taxes upon it by reason of his insolvency than can he escape the payment of taxes on his tangible property. The ownership is the controlling element. The distinction between taxes on property and taxes on franchises and privileges, as such is clearly stated in the Laylin case itself. It is there pointed out that taxes on property are subject to certain specific constitutional limitations, which are not applicable to taxes on privileges; and the court then proceeds to enunciate the value limitation as applied to the latter. So that, in any event, the Illinois tax considered in the *State Railroad Tax Cases* was a different kind of tax from that here involved. Nor was the value limitation, as a guaranty against confiscation, then before the court. The only question was whether there was that equality in operation which the Illinois Constitution required. The decision in the *Railroad Tax Cases* was, in the last analysis, really based upon the failure on the part of the complaining railroad companies to do that equity which was prerequisite to equitable relief, in that they had not paid the taxes on their tangible property which they conceded were due, and upon the further ground that the question involved had really been already decided by the Supreme Court of Illinois.

It is interesting to notice that Mr. Justice MILLER evidently had in mind the possibility that cases would arise in which even corporate franchises regarded as property might be valueless. Thus:

> "If taxes were assessable alone on the value of the capital stock and franchises of the corporation, cases might be found where these were worth nothing, and such companies would pay no tax even for their real estate and personal property."

It may be claimed that some language of Mr. Justice MILLER suggests that, so long as the corporate franchise is enjoyed, it must possess some value. The answer to this, however, is:

1. He had in mind such franchises regarded as property.

2. He was considering *corporate* franchises, which, from their very nature, possess elements of value which are almost indestructible.

3. If the suggestion were carried to its logical conclusion and were applicable to the value limitation, as laid down in the Laylin case, it would be necessarily destructive thereto.

If the mere possession of the privilege, in and of itself, conclusively, for all practical purposes, establishes the value of that privilege at whatever the State may choose to fix it, then, of course, all real life is taken out of the value limitation.

We do not believe that the Supreme Court of Ohio intended, in the Laylin case, to merely announce a rule which would be incapable of practical enforcement. We submit that the court's language shows clearly an intention to give such construction to the Ohio Constitution as

would protect the individual possessor of a privilege from a tax on that privilege, as such, which should exceed its value, and that, while in the first instance, the Legislature may be the judge of the value of such privileges, for the purpose of taxing them, as such, the question is one finally for the courts under the Ohio Constitution, as so interpreted. Such is virtually the language used by the court in the Laylin case, and we cannot believe that it may be rendered futile by a construction which would make the possession of a privilege for all practical purposes, conclusive evidence of its value.

Fourth: The case of *Adler v. Whitbeck, supra.*

In that case, and others like it, the state liquor tax was held to be valid, as a regulatory and restraining measure, serving the double purpose of discouraging the traffic and creating a revenue to meet the expenses of its regulation. Referring thereto, the court below used the following language:

> "In this respect it is assimilated to the tax here under consideration, whose object is to compensate the state and indemnify the taxpayer for the increased burden resulting from the special inconvenience and expense sustained and the supervisory power exercised by the government over corporate utilities and for the benefit of those who own and operate such."

This involves our tenth and eleventh assignments of error.

This involves the incorrect assumption which we have heretofore referred to, that this is a tax upon corporate franchises, as such. This simply ignores the plain language of the Act, which imposes the tax as an excise upon the privilege of carrying on certain lines of business, whether by individuals, partnerships, or corporations. It

may be conceded, for the purposes of the argument, that a corporation franchise possesses peculiar elements of value. This was adverted to by Mr. Justice DAY in the opinion in *Flint v. Stone-Tracy Company* 220 U. S., 107. The State cannot, however, assert the right to collect the tax, irrespective of the corporate or non-corporate character of the individual from whom it is collected, and then, at the same time, seek to sustain the validity of the tax in a specific instance in which a taxed individual happens to be a corporation, by claiming that its corporate character must be taken into account in measuring the value of the privilege upon which the tax is imposed. It was contended by appellees below that the tax might somehow be treated as a "commutation privilege tax intended to embrace all special privileges, as such." The idea seemed to be that the State, having expressly taxed the privilege of carrying on a particular business, might nevertheless, if the tax exceeds the value of carrying on the business, look to other privileges that might be possessed by the person engaged in the business, and if such other privileges exist and possess value, the tax might be automatically extended to them and thus saved. This, to say the least, is a novel suggestion, and one which we venture to believe the State would find embarrassing, if it should seek in the future, as it unquestionably has a right to do, to levy an excise tax upon any untaxed privileges possessed by any individuals or corporations now engaged in the several kinds of business falling within the present tax. The corporate form is not, as was further contended below, a mere adjunct to the carrying on of the business, and hence impliedly included therein. It involves a separate kind of privilege, possessing elements of value wholly distinct from the business in

which the corporation is engaged. This is clearly pointed out by Mr. Justice DAY in *Flint v. Stone-Tracy Company, supra.* These special elements of value either are or are not the basis of the present tax. If they are, then the tax is applicable only to corporations, but, by its terms, this is not so. If they are not, then their value cannot be used to sustain the tax. It will not do, therefore, to try to engraft upon the value of the privilege of doing business the value of another privilege which happens to be exercised by the same party at the same time, even though that other privilege is for the present untaxed.

It may be mentioned, in passing, that the court, in the Laylin case, must necesarily have had in mind some other measu . even of corporate privilege value than the mere possession or enjoyment of the corporate franchise itself, for the limitation was there laid down in a case where corporate franchises were actually being held and used.

The claim was further made below by appellees that the section of the Act defining gross earnings (Section 5418 G. C.) implies that the tax is upon the corporate franchise of a corporate utility, as such. This claim, however, cannot be sustained. The section referred to reads as follows:

> "The term 'gross earnings' shall be held to mean and include the entire earnings for business done by any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. The gross earnings for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings for business done by such company under the exercise of its corporate powers, whether from the operation of the

public utility itself or from any other business whatsoever."

No distinction is here made in the measure of the tax, whether the taxed utility be a corporation or a natural person. It is provided that where the utility is a corporation, its entire intrastate income shall be taken as the measure, because under the law, it must all be necessarily referable to utility operation, or some activity incidental thereto for the corporation can have but one main purpose, and it is not to be presumed that it will engage in ultra vires activities.

State ex rel. v. Taylor, 55 Ohio State, 61.

As a safeguard against possible evasion, therefore, and to insure a full return, it is provided that the entire intrastate income shall be returned. In the case of an individual or partnership, however, whose activities are unlimited, different language is employed, though the effect thereof is necessarily the same. In each instance, the gross earnings are the earnings from the operation of the utility, and all other activities in connection therewith.

Coming back to the liquor tax, and what was said by the court below with reference thereto, we submit that it is very clear that the present tax is not imposed for purposes of restraint, or to meet the expenses incident to utility regulation. It is a general revenue measure, and all taxes collected by the state treasurer under its provisions are credited to the general revenue fund.

Section 5491 G. C.

The matter of the regulation of public utilties, and the taxing of them for the purpose of meeting the expenses

thereof, is dealt with by legislation entirely distinct from that now under consideration.

The same Legislature which passed the present Act created the Public Service Commission, and clothed it with full regulatory powers over the same public utilities as are subject to the present tax, this in the exercise of its police power.

Sections 614-1, etc., General Code; 102 Ohio Laws, 549.

That Act amended Section 606 G. C., so that the same reads as follows:

> "For the purpose of maintaining the department of the Public Service Commission of Ohio, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding seventy-five thousand dollars each year shal be apportioned among and assessed upon the railroads and public utilities within the state, by the Commission, in proportion to the intrastate gross earnings or receipts of such railroads and public utilities for the year next preceding that in which the assessments are made.
>
> "On or before the first day of August next following, the Commission shall certify to the auditor of state the amount of such assessment apportioned by it to each railroad and public utility and he shall certify such amount to the treasurer of state, who shall collect and pay the same into the state treasury to the credit of a special fund for the maintenance of the department of such Public Service Commission."

Thus, it will be seen that the State has separately provided an excise tax for the purpose of meeting the expenses incurred to regulate the utility. Under familiar rules of statutory construction, it is apparent that the present tax was for a different purpose, namely, the pur-

pose which its own terms make plain, that is, the raising of general revenue, under the general taxing power of the State. The seventy-five thousand dollar tax is expressly for the purpose of meeting the expenses incurred in regulating the utilities. It is to be presumed that it is adequate for that purpose, and that, if it should cease to be, the Legislature will in the future, as it has in the past, increase it from time to time.

To impose two taxes of this same character would be, in effect, double taxation, and, while double taxation is perhaps not fatal in the case of excise taxes, nevertheless it is a result always to be avoided whenever any other construction of the statutes involved is possible.

Tennessee v. Whitworth, 117 U. S., 129.

Having thus considered the several reasons and authorities advanced by the court below in support of its conclusion that no relief can be afforded to the individual whose tax exceeds the value of the privilege taxed, we submit, with due deference, that they are insufficient.

The Ohio Court, in the Laylin case, declared that, under the Constitution of that State, a privilege tax in excess of the value of the privilege is confiscation, being an infringement of the inviolability of private property guaranteed by Section Nineteen of Article Two.

We contend that the right of private property is an individual and not a class right, and that the constitutional guaranties which protect it are for the benefit of the individual, and may be invoked by him without reference to whether or not the measure in question may confiscate the property of others. Such guaranties are always classed as provisions for the protection of the individual and his property.

Cooley's Constitutional Limitations, Seventh Edition, page 65.

We concede that the tax, as a whole, may not be overthrown because, as applied to appellants, it exceeds the value of their privileges respectively, but we insist that, under the Laylin case, they may claim individual protection of their own property from confiscation.

The same rule should be applied, by analogy, as is applied in cases of confiscatory rate regulation. It is now settled that the constitutional guaranties protect an individual railroad (or other utility) against rate legislation confiscatory as to it, and that such legislation is not rendered thereby invalid with respect to other railroads.

Missouri Rate Cases, 230 U. S., 474-508.

It is significant that the Ohio court, in laying down the value limitation in the Laylin case, cited, by way of analogy, the case of *Walsh v. Barron,* 61 Ohio State, 15, which is the leading case in Ohio on the limitation of the right to assess property for local improvements, and in which it was held that:

> "The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is that the property is specially benefited by the improvement, with the benefits common to the public, and that the ratable assessment of the property to the extent of those benefits violates no constitutional right of the owner, and is just and proper, but it can in no case exceed the benefits without impairing the inviolability of private property."

This makes it plain that the court had in mind those constitutional limitations which may be invoked by the individual for the protection of his property from confiscation. We believe that the constitutional limitations now under consideration should be so applied as to make the

protection which they afford, not merely theoretical, but real, and that the Ohio Supreme Court intended, in applying them to the excise tax here involved, to lay down a tangible line beyond which such taxes may not go. The language of the decision shows very clearly that the court had in contemplation the contingency that a privilege tax might, in some special instances, exceed the value of the privilege taxed, and the further contingency that such value might, in specific cases, not be "continued * * * from year to year," but might vary and shift from time to time. No other possible measure of value will meet these conditions than that which we have presented, namely, the capacity of the privilege to yield profits. No other measure obtains or can obtain in comparing business enterprises or business opportunities. It is the current measure of value, and hence must have been that which the court had in mind.

We submit that the court below did not give full force and effect to the decision of the Ohio Supreme Court in the Laylin case. It is there held that to tax a privilege beyond its value is to confiscate private property. The court below seems to have fallen into the error of confusing this with constitutional requirements touching uniformity in the operation of the tax. Misled by this error, it loses sight of the necessarily individual character of the right of private property, the protection of which the Ohio court really had in mind. Thus the court below was induced to the view that the appellants could not have relief because their cases were, for aught that appears, exceptional, losing sight of the fundamental principle that where the right of property is concerned, the constitution throws its protection around the individual, whether that

individual be a natural or an artificial person, and whether it be weak or strong.

B. Arbitrary and Discriminating Classification.

(This involves the third assignment of error.)

The legislature has the power to make reasonable classifications of occupations in connection with the imposition of an excise tax thereon, and in the exercise of this power it is entitled to use a reasonable discretion. There are, however, certain well established limitations upon this power, growing out of the Fourteenth Amendment to the Federal Constitution and the provisions of the several state constitutions, forbidding class legislation and insuring equality of treatment to all. While these limitations are not always as clearly defined and applied in the decisions as might be desired, nevertheless certain principles based thereon have now become firmly established. Among these are the following:

First: The classification must rest upon some reasonable basis. It must not be arbitrary or capricious.

Second: Each class must be complete in itself, and must contain all the individuals properly belonging within it.

Third: The tax must be uniformly imposed upon all the individuals belonging to the class.

Decisions in support of one or more of these principles will be cited and referred to subsequently in connection with our discussion of the particular questions touching the classification involved in this case.

1. *Failure to include all public utilities engaged in business in Ohio.*

The bills aver that the tax is imposed upon some only, and not all of the public utilities carrying on business within the state. This, for present purposes, stands admitted, and therefore it is hardly necessary to point out instances of utilities which are omitted. Some of those which might, if necessary, be mentioned, are:

Grain Elevators. (*Wyman on Public Service Corporations*, §97.)
Munn v. People of Illinois, 94 U. S., 113.
Stockyards (*Wyman*, §100.)
Cotting v. Stockyards Co. et al., 183 U. S., 79.
Ferries. (*Wyman*, §53.)
Bridge Companies (*Wyman*, §53.)
Inn Keepers. (*Wyman*, §106.)

It is true that the relative importance of public utility law has increased in recent years, but the principles involved are of common law origin. Be that as it may, public service law has now reached a stage where the principles which determine whether or not a given enterprise is a public utility are well settled, and as a result the line which separates them from other business undertakings is clearly drawn. (Wyman, §39.) It seems apparent that it was the intention of the act to levy an excise tax on public utilities. For this general purpose, the legislature exercised its power to classify and selected public utilities out of the sum total of valuable lines of business, as the class upon which the excise tax should be levied. Having chosen this class, we submit that it then became necessary to include all members of such class. This was not done. Actuated by some unknown motive, the legis-

lature saw fit to attempt an arbitrary and artificial classification of public utilities, by which same are included and others excluded.

The cases which were cited by appellees below show that this may not be done.

Thus, in the opinion of *Kentucky Railroad Tax Cases*, 115 U. S., 321, it was said:

> "The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially *to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar instances.*"

Again, in *Bell's Gap Railroad Company v. Pennsylvania*, 134 U. S., 232, the court, in upholding the Pennsylvania statute taxing securities issued by corporations at a higher rate than other moneyed securities, places emphasis upon the fact that "all corporate securities are subject to the same regulation."

In *Home Insurance Company v. New York*, 134 U. S., 594, the tax was sustained because, among other things:

> "Under the statute of New York all corporations, joint-stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. *There is no discrimination in favor of one against another of the same class.*"

In *Clark v. Titusville*, 184 U. S., 329, the court say, referring to the Fourteenth Amendment:

> "The rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it *shall operate on all alike* under the same circumstances."

Practically the same language is employed in deciding the case of *Magoun v. Ill. Trust & Sav. Bank,* 170 U. S., 283.

We submit that having chosen to tax public utilities, it is necessary that all of that class should be included. In their opposition to this claim, it was urged below that the tax is really on the several utilities regarded without reference to each other, and that the legislature did not attempt to tax public utilities as a class.

The best answer to this claim is to read the act as a whole. When the act is thus examined, it will be found to embody a scheme or plan by which public utilities are to be subjected to excise taxation. At the very threshold, the scope of the act is prescribed and its application to public utilities set forth. It is insisted, however, that the term "public utilities" is not used in its legal sense, but in an artificial and arbitrary sense peculiar to this act; that there is "an artificial or original meaning given to the term 'public utility.'" This was the position taken by appellants below so far as the present feature of the case is concerned. This contention, however, cannot have merit unless there is to be an utter sacrifice of substance to form. The principle involved is that in classification for taxation purposes, each class must be complete in itself, and must contain all the individuals property belonging within it. This principle surely cannot be circumvented by an arbitrary definition, for if it can then it is so easy of evasion as to be of no real force or effect. This is apparent, for if the legislature may take such units as it pleases out of a class to which they and other similar units belong naturally, and arbitrarily group them in an artificial class which it will designate by the name prop-

erly belonging to the natural class as a whole, then it follows that the unfortunate units thus selected are denied their constitutional right simply by the medium of a definition.

Suppose that a law were passed, levying an occupation tax on the privilege of carrying on the profession of attorney at law; and suppose that the act provided that for the purposes of the act an attorney at law should mean a practitioner at the bar who is regularly employed by any corporation, or such practitioner who is a graduate of a law school, or any other arbitrary or partial definition of the term. Would it be claimed for a moment that such a tax could stand?

Illustrations of the same character might be multiplied indefinitely.

See e. g. *Beckett v. Mayor,* 118 Ga., 58.

The effect of the present law is as if the tax had in terms been imposed on the privilege of engaging in the business of operating any public utility, and then the omitted utilities had been expressly exempted from the operation of the law. We submit that the legislature cannot take a natural class having well defined legal boundaries and artificially change those boundaries to the prejudice of those it has chosen to include.

The included utilities must compete with the excluded utilities in the money markets and elsewhere, and are thus subjected to a great and constant disadvantage.

2. *The tax does not operate uniformly among the utilities taxed.*

If the legislature has the power to select arbitrarily certain lines of business affected with a public interest and create out of them alone a class for taxation, the members of which are to be known as public utilities, "a class or genus of occupations created by its own fiat," as described by appellees below, then we submit that it must treat every member of that class alike. The legislature either has or has not such power. If it has not, the tax must fall, for reasons already presented. If it has, then such power must be so exercised as that the constituents of the class shall be taxed equally and uniformly.

This has not been done in the present instance. As to electric light, gas, natural gas, water works, telephone, messenger or signal, union depot, heating, cooling, and water transportation companies, the tax amounts to 1.2 per cent. on gross intrastate receipts. As to suburban and interurban railroads, it is fixed at 1.2 per cent, on gross intrastate earnings. On express and telegraph companies it is two per cent. On railroads it is four per cent. It is also four per cent. on pipe line companies.

Having created the class "by its own fiat" for the purpose of excise taxation, and having accorded such unequal treatment to the members thereof, how can the state now consistently claim that "there is no discrimination in favor of one or against another of the same class?" The Act, on its face, shows itself the agency through which gross favoritism and discrimination are brought about.

Suppose that the railroads' tax were figured on fifty per cent. of gross earnings, and all the other "utilities" on

one-tenth of one per cent. Would it be claimed that such discrimination could be practiced in the name of taxation?

Yet such a situation differs in degree only from that which is presented on this record.

It is argued by defendants that the legislature has still further exercised its power of classification and has subdivided or sub-classified the general class of public utilities. It may well be doubted whether, in any event, such a procedure would be warranted in the present instance. Having brought together certain units and created therefrom "by its own fiat" a class for taxation purposes, how can the legislature then disintegrate such class when it comes to fixing the burden of that tax?

Moreover, in making a classification even for purposes of excise taxation, the power of the legislature is not unlimited.

The general rule has perhaps never been better stated that it was by Mr. Justice BREWER, in *Gulf &c. Ry. Co. v. Ellis,* 165 U. S., 150-165:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based on some reasonable grounds, some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Where it is the intent to subdivide or subclassify a group of utilities, or, indeed, any kind of business enterprises, all of which are to be taxed for the privilege of carrying on their business, and such subclassification is for the purpose of fixing the rate at which each is to be taxed, the only

legitimate basis for such classification is that of the relative values of the privileges taxed. That and that alone, it seems to us, is the difference which bears a just and proper relation to the attempted classification. To bear a just and proper relation means to so operate as to do justice among the units classified and make the classification proper for the purpose which led to its adoption.

It appears from the averments of the petition that the classification is not according to value; that the privileges taxed on the 4 per cent. basis are not worth any more, or indeed as much as the privilege taxed on the much lower basis. In making its subclassification of utilities, the legislature either was or was not obliged to proceed on the basis of the relative values of the privileges taxed. If it was, then our contention is sustained. If it was not, then it was at liberty to ignore the relation of values and base its classification on some characteristic or characteristics wholly disconnected therewith. But this would be an arbitrary classification, because it would have no reason for existence other than the will of the classifying body.

To return to the realm of assessment law, an assessment which is made must be according to benefits. The assessing body must uniformly, and in accordance with that measure of benefits which it may have legally adopted, impose its assessment. It must uniformly retake from that which it has given. One property owner cannot be assessed in one way and another in another.

Railroad Co. v. Connelly, 10 Ohio State, 159.
Uppington v. Oveat, 24 Ohio State, 232.
Jaeger v. Burr, 36 Ohio State, 164.

Only where there is a substantial difference in the extent of the benefits conferred, can the uniformity be broken.

Findlay v. Frye, 51 Ohio State, 390.

The most flagrant instance of improper classification and arbitrary discrimination is found in the attempt to impose a tax at the rate of four per cent. on the business of operating a railroad, and at the rate of 1.2 per cent. on the business of operating an interurban railroad. So far as their business is concerned, and that is the thing taxed, the two enterprises are virtually identical. Their powers are the same. Each may be engaged in any kind of traffic open to the other. Many interurbans use steam, as well as electricity, for motive power. Many railroads employ electricity as well as steam.

The method in which the business is carried on, and not the charter provisions, control, so far as this tax is concerned.

Railroad v. Poland, 10 Nisi Prius, n. s., 617.

An examination of the statutes will disclose that an interurban railroad receives from the state and enjoys substantially every privilege which is accorded to any other kind of a railroad. There is no benefit conferred by the state which the plaintiff enjoys, that is not also enjoyed by the interurban which competes with it for traffic. As to the methods of operation, the characteristics which are sometimes thought to distinguish an interurban are all present in the case of the plaintiffs. Thus, the plaintiffs' passenger traffic predominates. Their business is mostly local. They make many stops at short intervals, and much of their business proceeds from stations where there is no agent, the train stopping upon a signal from a passenger. The road of the O. R. & W. is a narrow gauge. Its rolling stock is proportionately small and light. For all practical purposes, its method of operation is identical

with that of a so-called interurban. The mere fact that it happens to use steam as a motive power certainly is not sufficient to put it in a class by itself, when we remember that a so-called interurban may also use steam, and also that there is no reason why this plaintiff might not use electric locomotives instead of steam locomotives. The character of its business would not be affected by such a change, nor would the value of the privilege of engaging in that business be altered. The court will take notice of the fact that the competition between interurbans, so-called, and railroads, so-called, is sharp and constantly increasing. Under the circumstances, to impose upon the railroad company a tax at a rate which is more than three times as great as that of an interurban, is to effect a discrimination in the name of taxation, which, we submit, can neither be excused nor defended.

Courts have frequently been called upon to strike down excise taxes which, like the present one, involved arbitrary or discriminatory classifications.

The rule is well stated in *State v. Moore*, 113 N. C., 697:

> "Uniformity in its legal and proper sense is inseparably incident to the power of taxation, whether applied to taxes on property or to those imposed on trades, professions, &c."

In deciding the case of *Cache County v. Jensen*, 21 Utah, 207, in which a license tax on the business of raising sheep was held invalid, the court say, (page 227):

> "Unjust and illegal discrimination between persons in taxation and the denial of equal justice are within the prohibitions of the constitution of this state and of the United States. No person can be deprived of his property without due process of law."

In *Peoria v. Gugenheim,* 61 Ill. App., 374, the court was dealing with an ordinance which transgressed the rule. It was there held:

> "An ordinance which discriminates between persons of the same class and imposes a penalty for an act done by one person and exempts another who does a like act, is unreasonable and void." (Syl.)

In *Athens v. N. Y. etc. Tel. Co.,* 9 Pa. Dist. Rep., 253, it was held that—

> "a borough ordinance which imposes a license fee of $1 per pole upon all poles used for telephone or telegraph wires within the borough is unconstitutional and invalid, because it discriminates against telephone and telegraph companies in taxing their poles and exempting the poles of electric light and railway companies whose poles are as much within the mischief sought to be remedied as those of the telephone and telegraph companies." (Syl.)

In dealing with a measure taxing peddlers and itinerant merchants, it was held in *State v. Whitcorn,* 122 Wis., 110, that:

> "Sec. 1570 * * * cannot be sustained either as a tax law or as a police regulation. The exemption from its provisions of manufacturers, mechanics, nurserymen, and farmers who have owned the goods they hawk for three months or who actually manufactured or raised the products sold, of dealers in agricultural implements maintaining permanent places of business, of keepers of retail meat markets, of fish dealers, of sellers of fruit and vegetables in cities of the first class, and of persons selling at wholesale or to dealers only, and the discrimination in favor of blind, deaf and dumb, cripples and partially disabled veterans of the War of the Rebellion, are not based upon any legitimate classification germane to the purpose of the law in either aspect, and persons not so exempted are therefore denied the equal protec-

tion of the laws guaranteed both by the federal and the state constitutions."

In *State ex rel. Wyatt v. Ashbrook,* 154 Mo., 375, 77 American State Reports, 765, the court had before it an act which divided all articles of merchandise in classes and such classes into groups. Every merchant, in cities of over fifty thousand inhabitants, desiring to carry on the business of dealing in articles of more than one class or group was required to pay an amount to be fixed (within a certain maximum or minimum) by a commissioner in each city, and receive a license.

The court held that the act was not referable to the police power and must be upheld, if at all, as an exercise of the taxing power.

In holding that the law was an instance of "classification run wild," the following language is used:

> "The protection of liberty and of property, defined in Section 4 of the constitution, supra, 'as the gains of one's industry,' are among the principal objects for which free government among men has been established, and it is further declared in the closing paragraph of said section, 'that when government does not confer this security it fails of its chief design;' and of these rights no person shall be deprived without 'due process of law,' which means, as declared by this as by all courts of the land to be, 'the law of the land,' and these words, when having reference to legislative enactments, must mean a requirement of action or abstinence, binding upon and affecting alike each and every member of the community of the same class or of similar circumstances, enacted for the general public good or welfare. Does the act in question, by the imposition of the license fee provided for therein, infringe upon the liberty of the citizen whom it is to affect, or of this right to the enjoyment of the gains of his industry, or its equivalent, his property?

"If the terms 'life,' 'liberty,' and 'property,' as used in the constitution, are 'representative terms and cover every right to which a member of the body politic is entitled under the law,' as said by Sherwood, J., in *State v. Julow*, 120 Mo., 172, and that within this comprehensive scope are embraced the right to buy and sell as others may, and to pursue such honest calling, vocation, or business as the citizen may choose, subject only to such restraints or the imposition of such burdens as may be required or imposed for the general good, and if 'due process of law' is to be defined as 'the law of the land,' designed to protect and preserve the rights of the citizen against arbitrary legislation as well as against arbitrary, exclusive or judicial action, then 'due process of law' is denied when any particular person of a class of or the community are singled for the imposition of restraints or burdens not imposed upon and to be borne by all of the class, or of the community at large, unless the imposition or restraint be based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community; and this question as to whether the persons thus designated constitute a natural or a reasonable class depends upon facts which the court passing upon the validity or invalidity of the legislation must determine upon. While the legislature under its vested authority and power may arbitrarily impose taxes, restraints, and burdens of various kinds, within the constitutional limitations prescribed, that may become most onerous and oppressive to the citizen, which the courts can do naught but uphold, it cannot create conditions or fiat classes that will operate to make legislation alone applicable to those artificial conditions and classes as general law within the meaning of the constitution, or that will entitle it to the designation of 'the law of the land,' or that will make the act 'due process of law,' by which alone the liberty of the citizens may be restrained, or his property burdened or disposed of."

Juniata Limestone Co. v. Gagley, 187 Pa. St., 193, 67 American State Reports, 579, is an interesting case. The

court had before it an act seeking to impose a tax on the employers of foreign born, unnaturalized male persons. In holding the act violative of the Fourteenth Amendment, the court say:

> "The equal protection of the laws declared by the Fourteenth Amendment to the constitution secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances. Railroad Tax Cases, 13 Federal, 722, 723.
>
> "In that case the court said: 'Unequal exactions in every form or under any pretense are absolutely forbidden, and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid. It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purpose of taxation must have a just and reasonable basis, which is lacking here;' Gulf &c. Ry. Co. v. Ellis, 165 U. S., 150-65. In the last cited case, Mr. Justice Brewer said, 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable grounds, some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'"

In *W. U. Telegraph Co. v. Wright*, 185 Federal, 250, a franchise tax, the net return from which in the taxing state was but $1821.99, was held to be void because "excessive, discriminatory and unjust."

In *State v. Heinnan*, 65 N. H., 103, 23 A. S. R., 22, the first syllabus reads:

> "A statute which selects particular individuals from a class or locality and subjects them to peculiar rules or imposes upon them special obligations or burdens from which others in the same class or locality are exempt is unconstitutional."

In *Barber v. Connolly,* 113 U. S., 27, the court say of the Fourteenth Amendment, that it

> "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but * * * that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling or condition."

Again, in *Minneapolis Ry. Co. v. Beckwith,* 129 U. S., 26, it is said by Mr. Justice Field:

> "Equality of protection implies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind."

The arbitrary sub-classification now under consideration bears with crushing force upon the plaintiffs, because they are both small, local roads, doing very little interstate business, and hence the tax is computed upon practically their entire earnings. It is a matter of common knowledge that local transportation movements are relatively much the more costly and correspondingly less remunerative, and consequently the value of engaging in a railroad business confined thereto is much less than that of engaging in railroad operations which are extensive in their character and involve through movements of freight and passenger traffic.

Instead of attempting a classification based on value or even approximating it, the law has been so drawn as that in operation it exacts the heaviest excise from those whose operations are the least valuable. It assumes the greater value, when in fact there is the less.

This highly inequitable and inconsistent result is obviously due in part to the effort on the legislature's part to frame a law that would exact from railroad companies in the aggregate a total excise tax which would equal that received under the so-called Cole law, and nevertheless not violate the commerce clause of the Federal Constitution, as did the Cole law. This leads us to a consideration of the next assignment of error.

C. The Law, as Applied to Railroads, Lays a Burden Upon Interstate Commerce.

(Fourth assignment of error.)

Our claim is that the so-called Cole law, under which each railroad, prior to the Act of May 10, 1910, was compelled to pay a tax equal to one per cent, of its entire gross earnings computed by multiplying the average gross earnings per mile over the entire system by the number of miles in Ohio, was obnoxious to the commerce clause of the Federal Constitution; and that the Act of May 10, 1910, while it made the tax expressly an excise upon the privilege of carrying on business within the state and provided that the computation should be based solely on intrastate earnings, nevertheless, by leaving the percentages of the other utilities substantially as they were and multiplying that of railroads and pipe line companies (which were notoriously the utilities extensively engaged in interstate commerce) fourfold, condemned itself as an open and flagrant attempt to evade the bar of the commerce clause and created, in substance if not in form, a burden on interstate commerce.

Since this case was heard below, a state court has held that the Cole law was unconstitutional, resting its decision

largely on *Galveston etc. Ry. Co. v. Texas*, 210 U. S., 217. We anticipate that its unconstitutionality will now be virtually conceded by appellees, and hence will pass that question, which was elaborately argued below.

The case of *Galveston etc. Ry. v. Texas, supra*, was decided May 18, 1908. As a matter of common knowledge, it was regarded generally as determining the unconstitutionality of the Cole law, so far as railroads engaged in interstate commerce were concerned. It is more than significant that the present act, in its original form, was passed at the next regular session of the legislature.

The present Act, although enacted May 31, 1911, is a re-enactment without material change; so far as present purposes are concerned, of the original act of March 10th, 1910. The Act of March 10th, 1910, repealed the Cole law. The Cole law imposed a uniform tax of one per cent. on all gross earnings, both state and interstate, upon the same public utilities that are involved in the present tax. The Act of March 10th, 1910, increased the percentage in accordance with which the taxes were to be severally determined as follows: Railroad companies and pipe line companies, from one to four per cent.; express and telegraph companies, from one to two per cent.; all other utilities, from one to one and one-fifth per cent. Instead of taking all the gross earnings, the new percentages were to be applied only to intrastate earnings.

We contend that the enormous increase in the percentage of railroads and pipe line companies was due to the fact that it was conceived that about three-fourths of their business was interstate, and that therefore a tax of four per cent. on the intrastate earnings would about equal a tax of one per cent. on the total; in other words, that the

tax was increased four-fold because such utilities were engaged in interstate commerce.

A good deal of light is thrown upon this proposition in an opinion rendered to the Governor and each of the committees on finance, judiciary, and taxation, in the Senate and House; under date of March 5th, 1910; (Ohio Executive Documents, Part II, 1910, page 168.) The opinion is a long one. In brief, it set forth the dilemma which the state officials had found themselves in by reason of the probable unconstitutionality of the Cole law, under the then recent decision of this Court in the case of *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, supra.* It called attention to the large loss of revenue which would result to the State if the Cole tax were declared unconstitutional, and cited the instance of the Buckeye Pipe Line Company, which had, since the Texas decision, refused to pay that portion of its Cole tax measured by its interstate commerce, which portion was about three-fourths of the total. The opinion proceeds to suggest, in somewhat guarded fashion, the advisability of new legislation, which should avoid the doubtful features of the Cole law, and, at the same time, produce an equal amount of revenue for the State.

We call attention particularly to the following extracts from the opinion:

"Gentlemen:

"This communication is sent to you because of a situation with which this department has been confronted since the latter part of December, 1908, a situation which in the end may seriously affect the revenues of the state and of its political sub-divisions.

"The matter involves the validity, * * * of * * * the 'Cole excise tax law' * * *.

"The Buckeye Pipe Line Company is a corporation incorporated and organized under the laws of Ohio * * * and is subject to the provisions of the Cole law. * * *

"In the month of May, 1908, this company made its report to the auditor of state giving its gross receipts for business done in Ohio during the year preceding that month as $9,099,969.00. * * * "After this decision" (the Texas case) "the Buckeye Pipe Line Company sent to the Auditor of State an amended report setting forth that of the more than nine million dollars of gross receipts returned by it, as stated above, $7,099,969.00 was receipts from interstate business, and that the receipts of the company from business done wholly within Ohio amounted to $2,000,000, and it asked for a hearing upon this report, claiming that it should not be required to pay an excise tax of more than one per cent. of the gross receipts realized from business done wholly within the State of Ohio."

The opinion then calls attention to the practical difficulty presented by the claim of the Buckeye Pipe Line Company, in that if it were given publicity, through litigation, all the other utilities engaged in interstate commerce would refuse to pay their Cole tax until such time as the question is determined, and thus the State would be deprived, in the meantime at least, of a large amount of revenue. To meet this difficulty temporarily, the opinion recites that the Attorney General's Department had refrained from bringing suit against the Buckeye Pipe Line Company, with a view to postponing the crisis to such time as the Legislature might be in session, but that it was felt that such a policy could no longer be continued with justice to other utilities, and that therefore the question of the validity of the Cole tax must now be tested out in the courts.

The opinion, while it does not concede the invalidity of the Cole law, expresses very grave doubt as to whether it could be sustained.

"In suggesting possible remedies under which excise revenues may be continued through constitutional laws I would not be understood as recommending the collection of a greater amount of revenue into the state general revenue fund than is being now collected or rather that was being collected before the recent falling off of revenues under the Aiken Liquor Tax.

* * *

"So far ,therefore, as the validity of the Cole law in its present form is concerned, my conclusion is that there is nothing to do in our case except to await the outcome of our proposed suit which will test that question. In the meantime, however, I am clearly of the opinion that the General Assembly may readjust these franchise or excise tax laws, that is the Cole and Willis law, and that they may adopt any one of the following plans:

(a) They may require each of the public service corporations subject to the Cole law to pay an excise tax to the state, measured by taking some rate higher than one per cent. of the gross receipts or earnings of such companies realized from intrastate business and excluding interstate business and business done for the federal government.

(b) Or they may reasonably classify these public service corporations and require one class to pay such franchise tax at one rate and another class at a different rate, the tax to be measured in each case, of course, through the gross receipts received from intrastate business and excluding the receipts from interstate business and business done for the federal government. This classification would be according to kinds or nature of the business.

* * *

"How much of this shortage of a million and a quarter dollars, or the two milion dollars if you consider the shortage of $700,000 under the operation of

> the local option law, may be made up by an increase in the rates of excise tax on intrastate business, I am not able to say, because at this time I am not advised as to the relative amounts of intrastate business and interstate business done by the several public service corporations aside from the Buckeye Pipe Line Company. Many of these corporations do not keep a separate account of these two classes of business, and any administrative tax law which shall be passed should give the power to the tax commission to require this information to be given."

The opinion concludes with a discussion of proposed reformations in connection with property taxes, and administrative measures for their collection.

When the entire situation is looked to, we submit that there can be no escape from the conclusion that the tremendous increase in the tax, as applied to railroads, was a mere device by which it was sought to do in effect what could not be done in terms, namely, to continue to lay a burden upon interstate commerce. The old basis of computation provided for in the Cole law had to be changed, for it had been held unconstitutional. Under the Cole law there was a basis of computation provided, together with a unit of percentage as applied to railroads. The result of the Texas decision was to render that basis invalid. In an effort to evade the constitutional limitation, the legislature changes the basis, reducing it so as to make it conform with the Texas decision, and then correspondingly increases the unit of percentage, so as to make the net result the same. In other words, having been forced to reduce the multiplicand, the multiplier is proportionately increased and the product is preserved. We submit that this is a flagrant attempt to accomplish an unconstitutional result by indirection, that it is not a bona fide

attempt to reach a taxable privilege, but, rather an unlawful effort to burden a privilege that is non-taxable under the Federal Constitution.

The Federal Courts are, we think, becoming increasingly alert in detecting and striking down attempts of this kind, and they do not hesitate to look through the form to the substance and effect of taxing statutes. This is but one application of the rule that states will not be permitted to pass laws intended to burden interstate commerce, even though such intent is disguised by specious phraseology.

Thus it is said by Mr. Justice HARLAN, in rendering the opinion of the court in the case of *Brimmer v. Rebman*, 138 U. S., 78:

> "Undoubtedly, a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states."

In deciding the case of *United States Express Co. v. Minnesota*, 223 U. S., 335, the following language is used by Mr. Justice DAY, page 344:

> "The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas* 210 U. S., *supra*, wherein the possible differences between the decisions in *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S., *supra*, and *Maine v. Grand Trunk Ry. Co.*, 142 U. S., *supra*, were commented upon and explained."

And again at page 348:

> "Upon the whole, we think the statute falls within that class where there has been an exercise *in good faith* of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the state."

Whenever the law making power, whether it be Congress or a state legislature, attempts to accomplish a purpose which is unconstitutional, the courts will not hesitate to strike down the result of such an attempt, even though the unlawful purpose may be disguised. This was recognized by Chief Justice MARSHALL, in McCulloch v. Maryland, 4 *Wheaton*, 316, in which he said:

> "Should Congress under the pretext of exercising its powers pass laws for the accomplishment of objects not entrusted to the Government it would become the painful duty of this tribunal, * * * to say that such an act was not the law of the land."

In the case of *Mugler v. Kansas*, 123 U. S., 623, Mr. Justice HARLAN, in pronouncing the opinion of the court, uses the following impressive language:

> "The courts are not bound by mere forms nor are they to be misled by mere pretenses. They are at liberty—indeed are under the solemn duty—to look at the substance of things whenever they enter upon the inqury whether the legislature has transcended the limits of its authority."

The General Assembly of Ohio, as incident to its general legislative powers, possesses the power to tax. This power, however, may not be used for an illegitimate pur-

pose or to accomplish that which is forbidden by the paramount law of the land. In the present instance we claim that it has attempted to do this, and that, under all the circumstances, it is apparent that the four per cent. tax was prescribed for the purpose of continuing a burden upon interstate commerce which had first been created by the then discredited Cole law.

D. The Law is in Effect a Double Tax Upon Property, and Hence is Lacking in Uniformity, and is a Denial of the Equal Protection of the Law.

This involves the sixth assignment of error.

Section Two of Article Twelve of the Ohio Constitution requires the taxing of property by a uniform rule.

We present this assignment of error as an alternative assignment, for consideration in the event that appellees, in response to our argument heretofore advanced in connection with the *State Railroad Tax Cases*, should take the position that the value of a franchise or privilege as property and its value as a privilege are identical. If such position be taken, then we submit that, under this assignment of error, appellees at best would only escape from one error to another. If the values are identical, then the present is, for all practical purposes, an additional tax on property already taxed as a part of an operating unit.

It appears very clearly from the decisions dealing with the so-called Nichols law, (the provisions of which are now applied to all the so-called utilities) that the intention is to reach all those intangible values which arise out of the fact that the tangible property is used in carrying on a business of a specific character.

Adams Express Co. v. Ohio State Auditor, 165 U. S., 194. Same case on rehearing: 166 U. S., 185.

It must be conceded by appellees that a double tax on property would be violative of Section Two of Article Twelve of the Ohio Constitution, and, if so, then an attempt to seize property for the purpose of satisfying such an illegal exaction would constitute the taking of property without due process of law, and would also deny to the owners thereof the equal protection of the law.

E. The Tax is in Contravention of the Commerce Clause of the Federal Constitution, in that it is Imposed Upon Gross Receipts from Foreign Commerce.

(Fifth assignment of error.)

The appellees aver that appellants are engaged in foreign commerce. It will, we think, be virtually conceded by appellees that if, as in the case of the Cole law, the tax were based upon entire gross receipts, without excepting those attributable to interstate operations, it would be invalid.

We are thus led to the question whether receipts from foreign commerce must not also be excluded. The commerce clause of the Federal Constitution confers upon the national authority the power to regulate commerce,—(a) with foreign nations; (b) among the several states; and (c) with the Indian tribes. The power extends equally to each of the three classes of commerce, and each of these classes is distinct from the other.

In the case of *Veazie et al. v. Moor*, 14 Howard, 568-573, Mr. Justice Daniel, delivering the opinion of this court, uses the following language, referring to the powers conferred upon the national government by the commerce clause:

> "These categories are, 1st. Commerce with foreign nations. 2d. Commerce amongst the several States.

> 3d. Commerce with the Indian tribes. Taking the term 'commerce' in its broadest acceptation, supposing it to embrace not merely traffic, but the means and vehicles by which it is prosecuted, can it properly be made to include objects and purposes such as those contemplated by the law under review? Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extraterritorial. The phrase can never be applied to transactions wholly internal, between citizens of the same community, or to a polity, and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community.
>
> * * *
>
> "The rule here given with respect to the regulation of foreign commerce, equally excludes from the regulation of commerce between the states and the Indian tribes the control over turnpikes, canals, or railroads, or the clearing and deepening of water-courses exclusively within the States, or the management of the transportation upon and by means of such improvements."

See also *Lord v. Goodall, Nelson & Perkins Steamship Co.*, 102 U. S., 541.

Inasmuch as the State of Ohio borders upon one of the Great Lakes, some of the foreign commerce initiated in that state moves directly therefrom to its foreign destination, without passing through any other states of this Union, and hence is foreign commerce in the strictest sense of the term.

There can be no doubt but that the receipts or earnings derived by the railroads from such foreign commerce must be included in the gross upon which the tax is based.

Section 83 of the act (Section 5472, G. C.), is as follows:

> "In the case of each railroad company, such statement shall also contain the entire gross earnings, in-

cluding all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross earnings of such company for such period in this state from business done within this state."

Section 88 (Section 5477, G. C.) is as follows:

"On the first Monday of October, the commission shall ascertain and determine the gross earnings as herein provided, of each railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the commission shall be the gross earnings of such railroad company for such year."

The gross earnings so ascertained constitute the basis for the four per cent. tax. Inasmuch, therefore, as no deduction of the earnings from foreign commerce is provided for, we claim that the result is as fatal to the law as if there had been a failure to deduct earnings from interstate business, and that this necessarily follows from the equal and co-extensive power of the national government over both. The fact, if it be such, that the proportion of foreign commerce carried on by the railroads is relatively small, can make no difference. The principle involved is the same, whether the proportion be large or small. Nor can the earnings attributable to foreign commerce be separated from the total gross earnings and the tax sustained as to the remainder. The law does not provide for or contemplate such a separation, and it must be

judged as it is. It is as incapable of judicial reconstruction in this respect as the law before the court in the case of *Meyer, Auditor of the State of Oklahoma, v. Wells, Fargo & Company,* 223 U. S., 298, where this court, through Mr. Justice Holmes, used the following language with reference to the state tax law:

> "Whether the statute could be construed as separable of course would be ultimately for the state court in any event. *Telegraph Co. v. Texas,* 105 U. S., 460. But we see no possible construction on which it could be upheld without being so remodeled that it would be a mere speculation whether the legislature would have passed it in the new form. For, to recur to the statute, it is not simply a tax on all gross receipts within the state, which possibly might be read as intended to reach such receipts as it could, even if less than all, *Ratterman v. Western Union Telegraph Co.,* 127 U. S., 411, it is a tax on a proportion of total gross receipts a considerable part of which, as we have explained, the State has no right to tax. Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

The present act is very explicit as to deductions which are to be made, and there are two only: Receipts arising wholly from interstate business, and receipts arising from business done for the federal government. Whether the law would have been passed at all in its present form, if other deductions had been made or contemplated, is, at best, merely a matter for speculation.

It may be contended that, in order to save the statute, the court should give to the word "interstate" business, as used in the state statute, a meaning broad enough to include foreign business as well.

It is true that the word "state" has sometimes been held broad enough to include foreign states, but this has been usually in connection with some treaty provision with a foreign government. In the present instance, the word "interstate" was clearly used in the same sense that the phrase "among the several states" is used in the commerce clause of the Federal Constitution. It was early decided that the word "state," when used in the Constitution, cannot be taken in its broadest signification, but is limited to those several sovereign states which comprise the Union.

A leading case is *Hepburn and Dundas v. Ellzey*, 2 Cranch, 445. Deciding that case, it was said by Mr. Justice Marshall:

> "The question in this case is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia.
>
> "This depends on the act of Congress describing the jurisdiction of that court. That act gives jurisdiction to the Circuit Courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state. To support the jurisdiction in this case, therefore, it must appear that Columbia is a state.
>
> "On the part of the plaintiffs it has been urged that Columbia is a distinct political society; and is, therefore, a 'state' according to the definitions of writers on general law.
>
> "This is true. But as the act of Congress obviously uses the word 'state' in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the constitution."

The Constitution gives Congress power to regulate commerce "among the several states" and "with foreign nations." The former phrase has been compacted into the words "interstate commerce", and the latter into the words "foreign commerce."

In providing for the deduction of earnings arising from interstate business, the state statute must be construed as if it provided for deduction of earnings arising from business among the several states.

In the case of *Eidman v. Martinez*, 184 U. S., 578, Mr. Justice Brown, in delivering the opinion of the court, said:

> "It need only be added that while the words 'state or territory' are used in treaties, and perhaps also in some of the acts of Congress regulating our international relations, as including foreign states, they are used in the Constitution and in ordinary acts of Congress as applying only to states or territories of the United States."

F. The Act is Unconstitutional Because of its Effort to Prevent Judicial Inquiry and Force Obedience to its Terms and Administrative Acts Thereunder, Irrespective of Their Validity.

(This involves our seventh assignment of error.)

An examination of the provisions of the Act shows very clearly an intention to prevent any utility from questioning and having determined, by due course of law, the validity either of the Act itself or of any tax levied thereunder.

Section 102 of the Act (Section 5491, G. C.) provides for a fifteen per cent. penalty in the event of non-payment of the tax before the fifteenth of December in each year.

Section 103 (Section 5492, G. C.) is as follows:

"Such taxes or fees and penalties thereon may be recovered by an action in the name of the state, which may be brought in the Court of Common Pleas of Franklin county, or of any county, in which such corporation has an office or place of business, or in which such public utility is doing business, or the line of any street, suburban or interurban railroad company or railroad company is located, and such Court of Common Pleas shall have jurisdiction of such action regardless of the amount involved therein. The attorney general, on request of the commission, shall institute such action in the Court of Common Pleas of Franklin county, or of any of such counties as the commission may direct. In any such action it shall be sufficient to allege that the tax, fee or penalty sought to be recovered, stands charged on the delinquent duplicate of the treasurer of state, and that the same has been unpaid for a period of thirty days after having been placed thereon. Sums recovered in any such action shall be paid into the state treasury, to the credit of the general revenue fund."

Section 120 (Section 5509, G. C.) is as follows:

"If a corporation, wherever organized, required by the provisions of this act, to file any report or returns or to pay any tax or fee, either as a public utility or as a corporation, organized under the laws of this state, for profit or as a foreign corporation for profit doing business in this state and owning or using a part or all of its capital or plant in this state, or as a sleeping car, freight line or equipment company, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the commission shall certify such fact to the secretary of state. The secretary of state shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this state. by appropriate entry upon the margin of the record

thereof, or cancel the certificate of authority of any such foreign corporation to do business in this state by proper entry. Thereupon all the powers, privileges and franchises conferred upon such corporations, by such articles of incorporation or by such certificate of authority, shall cease and determine. The secretary of state shall immediately notify such domestic or foreign corporation of the action taken by him."

Section 121 (Section 5510, G. C.) is as follows:

"Any person or persons who shall exercise, or attempt to exercise, any powers, privileges or franchises, under the articles of incorporation or certificate of authority, after the same are canceled, as provided in section one hundred and twenty of this act, shall be fined not less than one hundred dollars nor more than one thousand dollars."

Section 123 (Section 5512, G. C.) is as follows:

"In addition to all other remedies for the collection of any taxes or fees due, under the provisions of this act, the attorney general shall, upon the request of the commission, whenever any taxes, fees or penalties due, under this act, from any public utility or corporation shall have remained unpaid for a period of ninety days, or whenever any corporation or public utility has failed or neglected for ninety days to make or file any report or return, required by this act, or to pay any penalty for failure to make or file such report or return, apply to the Common Pleas Court of Franklin county, or of any county in the state in which such public utility or corporation is located or has an office or place of business, for an injunction to restrain such public utility or corporation from the transaction of any business within this state, until the payment of such taxes or fees and penalties thereon, or the making and filing of such report or return and payment of penalties for failure to make or file such report or return, and the costs of such application, which shall be fixed by the court.

Such petition shall be in the name of the state, and if it is made to appear to the court, upon hearing, that such public utility or corporation has failed and neglected, for ninety days, to pay such taxes, fees or penalties thereon, or to make or file such reports or returns, or to pay such penalties for failure to make or file such reports or returns, such Court of Common Pleas shall grant and issue such injunction. All actions brought under this act shall have precedence over any civil cause of a different nature pending in such court, and the Court of Common Pleas shall always be deemed open for the trial of any such action brought therein."

Section 124 (Section 5513, G. C.) provides for proceeding against delinquent utilities by quo warranto. It is as follows:

"If any corporation fails or neglects to make and file the reports or returns, required by this act, or to pay the penalties provided in this act for failure to make and file such reports or returns, for a period of ninety days after the time prescribed in this act, the attorney general, on request of the commission, shall commence an action in quo warranto, in the Circuit Court of Franklin county, or of any county in this state in which such corporation is located or has an office or place of business, to forfeit and annul its privileges and franchises. If the court is satisfied that any such corporation is in default as aforesaid, it shall render judgment ousting such corporation from the exercise of its privileges and franchises within this state, and shall otherwise proceed as provided in Chapter One of Title VIII, Part 3, of the General Code."

Section 158 (Section 12924-5, G. C.) is as follows:

"Every day during which any public utility, company, corporation, association, firm, co-partnership, officer or individual, subject to the provisions of any law which the tax commission of Ohio is required to administer, or any officer, agent or employe thereof

> shall willfully fail to observe and comply with any order or direction of such commission or to perform any duty enjoined by such law, shall constitute a separate and distinct offense."

It is apparent that so far as any corporation is concerned at least, an attempt to contest the validity of the act or to resist the collection of an excise tax levied thereunder would necessarily defeat itself, for the existence of the corporation and its power to engage in any corporate activity would, under Section 120, have been terminated long prior to the time within which such questions could be judicially determined, and an attempt on the part of any of its officers or agents or representatives to thereafter continue the contest would subject them to the fines and penalties of Section 121, which, when accumulated under Section 158, would be enormous. The effect of the act, so far as corporations are concerned, is therefore to force obedience to its terms and to any administrative act which may be done thereunder, upon the penalty of death in case of refusal or resistance.

The scheme of coercion is completed by the provisions of Section 33 (Section 1465-31, G. C.), to the effect that

> "No injunction shall issue suspending or staying any order, determination or direction of the Commission, or any action of the auditor of state, treasurer of state, or attorney general, required by law to be taken in pursuance of any such order, determination or direction, but nothing herein shall affect any right or defense in any action to collect any tax or penalty."

As we have already pointed out, the last clause of this section would be practically inoperative, because the corporate existence of the contesting utility would be terminated long before the question could be settled.

The case of *Ex parte Young*, 209 U. S., 123, with the cases cited in its opinion, would seem to furnish ample authority to sustain our claim that these coercive portions of the act at least, if not the act as a whole, are unconstitutional. In that case, the penal provisions of the Minnesota statutes involved in the so-called Minnesota rate case were held unconstitutional, on the grounds that they were calculated to prevent a judicial investigation and determination of the validity of the rates established by the legislature, or its creature, the state commission, and amounted, in effect, to an attempt to make such rates final and irreviewable. We quote the following passages from the opinion by Mr. Justice Peckham:

> "The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employes could not be expected to disobey any of the provisions of the acts or order at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. The observations upon a similar question, made by Mr. Justice Brewer in Cotting v. Kansas City Stock Yards Co., 183 U. S., 79, 99, 100, are very apt. At page 100 he stated: 'Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?' Again, at page 102, he says: 'It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legisla-

ture, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.' * * * In McGahey v. Virginia, 135 U. S., 662-694, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy; and, when the remedy is so onerous and impracticable as to substantially give none at all, the law is invalid, although what is termed a remedy is in fact given. * * * If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S., 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional."

The court points out further that in the case of the making of a rate, the power of the legislature is not complete, but that its exercise is always in the last analysis subject to judicial review. This, of course, is also true of the power to levy excise taxes, for while the determination of values, upon which alone such taxes can be assessed, is primarily with the legislature, it is "finally in the courts." *Southern Gum Co. v. Laylin, supra.*

Section 33 is also probably unconstitutional upon other grounds.

The collection of any other tax may be enjoined upon a proper showing, and the state courts are open for that purpose. But those upon whom this particular tax is imposed

are denied injunctive relief, however clear their rights and however persuasive the equities in their favor may be. Possibly, the legislature could destroy entirely the equity jurisdiction of the state courts, but it cannot, while that jurisdiction remains, deny to anyone the right to invoke it. It cannot say that the right to equitable relief shall be enjoyed under some circumstances which would entitle one to it, and shall be denied under other circumstances which equally would entitle one to it. This would be, in effect, closing the court, so far as that jurisdiction is concerned, to a disfavored class.

Attempts have sometimes been made to forbid courts of equity from exercising their jurisdiction in certain cases, for example, in labor disputes, but such laws have uniformly, so far as we know, been held invalid.

Goldberg, Bowen & Co. v. Stablemen's Union, 86 Pacific, 806.
Pierce v. Stablemen's Union, 103 Pacific, 324.

In the case last cited, the court say, referring to a statute of this kind:

> "Not only would it be void as violative of one's constitutional right to acquire, possess, enjoy and protect property, but as well would it be obnoxious to the Constitution in creating arbitrarily and without reason a class above and beyond the law, which is applicable to all other individuals and classes."

Viewed from another constitutional standpoint, the attempt to prescribe upon what state of facts a court of general equity jurisdiction shall not exercise such jurisdiction and grant relief is an attempted exercise of judicial power which is expressly forbidden by our constitution.

It is significant to note that the Supreme Court of Ohio, in the case of *State ex rel. v. Jones, Auditor,* supra, held

that due process of law was not denied by the Nichols law because of the opportunity which was open to test its validity by injunction.

51 Ohio State, 492; particularly pages 516, 517 and 518.

After citing the case of *Davidson v. New Orleans*, 96 U. S., 97, and *Jones v. Davis*, 35 Ohio State, 474, the court say:

> "So that, in the case of an express company, after the board of appraisers and assessors has certified to the county auditor the amount proportioned to his county of the value of the company's property, and before the county auditor has proportioned the amount among the several taxing districts, and placed the same on the tax lists to be assessed and collected as taxes are assessed and collected on other property, an injunction will lie in favor of the company, to enjoin the auditor from carrying such amount upon the duplicate, and thereby afford an opportunity to inquire into the legality of the assessment before a lien attaches, and before the treasurer is warranted to make collection.
>
> "In McMillen v. Anderson, 95 U. S., 37, it was held, that a statute which gives a person against whom taxes are assessed a right to enjoin their collection, and have their validity judicially determined, is due process of law."

In addition to other penalties and forfeitures, Section 156 of the act provides for a fine of from twenty-five to one thousand dollars for each offense wherever anyone violates any provision of a law which the Tax Commission is required to administer, or neglects or refuses to perform any duty therein required for which a penalty has not been otherwise provided, or neglects or refuses to obey any lawful requirement or order made by such commission.

It will be claimed, doubtless, that even though these coercive provisions and restrictions upon remedial rights may be unconstitutional, their invalidity will not render the tax itself unconstitutional, and reliance will be placed upon those terms in the act which provide that the sections shall be treated separately and that the invalidity of one shall not affect the others. Nevertheless, the court must look at the act as a whole, and if it appears that it was the intention of the legislature to clothe the tax commission and the other officials involved with an absolute power not to be interfered with in any event by the courts, and that it cannot be said that the taxing provisions would have been enacted except as a part of this scheme, then we feel that the court would not be justified in making a separation, and would have no alternative but to hold such taxing provisions void. In any event, the invalidity of the sections now under consideration would warrant and require the granting of the temporary injunctions for which the plaintiffs are now asking, in the event that their bills are held to state causes of action. This would follow, because only by such temporary injunction can they receive the protection to which they are entitled, pending the final determination of the issues that may be made.

CONCLUSION.

We are, of course, aware that the presumption is in favor of the validity of the tax law, and that a rather wide variety of excise taxes have been sustained by this court. On the other hand, where there is a clear violation of the State or Federal Constitution, or both, this court has never hesitated to grant relief.

We claim that, under our several assignments of error, the District Court was wrong when it refused to grant appellants the temporary injunctions they were seeking.

We maintain that either the tax law, as a whole, is invalid, or, if not so, nevertheless appellants are entitled to relief because, under the admitted facts, the tax, as to them, exceeds the value of the privilege taxed, which, under the Ohio Constitution, as construed by the Ohio Supreme Court, is not permissible where a tax on a privilege, as such, is concerned.

Respectfully submitted,

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